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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY _____
DEPUTY

Pierce County Cause Nos. 15-1-01998-0; 15-1-01999-8;
15-1-02001-5; and 15-1-02002-3

STATE OF WASHINGTON,

Plaintiff/Appellee,

v.

ROBERT R. COMENOUT JR., LEE ALLEN COMENOUT SR.,
MARLENE COMENOUT AND ROBERT R. COMENOUT SR.;

Defendants/Appellants.

CORRECTED OPENING BRIEF OF APPELLANTS

Robert E. Kovacevich, #2723
818 W. Riverside Ave., Ste 525
Spokane, WA 99201
(509) 747-2104
Attorney for Defendants/Appellants

Aaron L. Lowe, #15120
1403 W. Broadway Ave.
Spokane, WA 99201
(509) 323-9000
Attorney for Defendants/Appellants

Randal B. Brown, #24181
25913 163rd Avenue S.E.
Covington, WA 98042
(253) 630-0794
Attorney for Defendants/Appellants

US Priority Mail 1/18/17 Express

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INTRODUCTION

This Opening Brief is for all four Appellants, as allowed by RAP 10.1(g). The Joint Appellants are referenced herein as “the Comenouts” or individually by name.

This Appeal is on Alford pleas, CR. 40, 112, 183, 241. The Comenouts, all enrolled Indians, were charged with criminal failure to obey state cigarette tax laws, RCW ch. 82.24. The overriding issue is whether the state courts have personal or subject matter jurisdiction to charge the Comenouts for alleged state cigarette tax crimes allegedly committed on a public domain restricted allotment.

On February 8, 1887, Congress enacted the General Allotment Act, including what is now 25 U.S.C. § 349. This section contains the reason why the cases should be reversed and dismissed. The statute states that until “restrictions as to sale, incumbrance or taxation” are removed, the allotments are within the “exclusive jurisdiction of the United States.” When the restrictions expire, the allottee “shall be subject to the laws, both civil and criminal.” The allotments may be off reservation and, until the restrictions are removed, shall be “exempt from State and local taxation” 25 U.S.C. § 5108. The Comenout property is still restricted.

Secondly, is whether the state had authority to issue state warrants to arrest the Comenouts in Indian Country for a crime that involves the state cigarette tax. Also, whether they, as Indian retailers, were the persons in the chain of distribution that had to stamp the cigarettes or pay the taxes at point of purchase. In 1995 and 2003, the state legislature radically changed the law so that the state cigarette tax exempts the Comenouts, enrolled Native American Indians, whose business was located in Indian Country. The state cigarette tax law adopts the federal definition of Indian Country that includes off reservation allotments.

The allotment, now about 1 ½ acres, was originally about 3 ½ acres. It is located at 908/920 River Road, Puyallup, Washington and is designated by the BIA as Public Domain Allotment No. 130-1027. Only about 11 million acres of land in the United States is in Indian allotments, both off and on reservations. *Cohen's Handbook of Federal Indian Law*, § 16.03 [4][b], page 1079 (Nell Jessup Newton ed. 2012). The number of off reservation restricted allotments in cities abutting high traffic roadways has to be minuscule. Material statutes are set forth in the attached Appendix.

I.

ASSIGNMENTS OF ERROR

One

Whether the court below had any personal or subject matter jurisdiction to decide the cases?

Two

Whether state court arrest warrants are void when issued to arrest Indians on restricted allotments?

Three

Whether *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011), submitted by this Court to the State Supreme Court under RCW 2.08.010, on only two narrow issues categorizing the allotment as “tribal trust land” and later dismissed ex parte, has any application to the Comenouts who are Indians, but not Quinault Indians?

Four

Is *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011) res judicata or collateral estoppel to this Appeal?

Five

Was *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (Wash.

2011) wrongly decided on the issue of Public Law 280, since Congress never extended state tax jurisdiction of Indians to the State of Washington?

Six

Are state courts obligated to apply the federal preemption cases of *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011) and *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), cases never considered by *State v. Comenout*?

Seven

Do the radical changes in the state cigarette tax statutes, RCW § 82.24, in 1995 and 2003, and the Indian reservation cigarette tax compacts make the *Colville* case, 447 U.S. at 159, impotent and ineffective to prosecute Indians like the Comenouts?

Eight

Is the Comenout allotment, Public Domain Allotment No. 130-1027, defined by 18 U.S.C. § 1151(c) and therefore within RCW § 82.24.010(6)?

Nine

Does disparate treatment of military sales and Indian sales dispense with notice on Indian transportation?

Ten

Does the prosecution of the Comenouts, but not Martina Garrison, a non Indian involved in the same activity, amount to selective prosecution?

II.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

One

Whether the trial court had jurisdiction to try an enrolled Indian owner and his Indian family for a state tax crime occurring on a federally restricted allotment. (Assignment One).

Two

Whether a search warrant issued by a state court to arrest enrolled Indians for crimes allegedly committed on a federally restricted allotment is valid. (Assignment Two).

Three

Is *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011) binding precedent on the issues of jurisdiction or validity of the search warrants or do the federal cases control? (Assignments Three, Four, Five and Six).

Four

Whether the changes in the state cigarette tax statutes in 1995, 2003 and by Indian tribe cigarette tax compacts no longer require Indians to comply with the cigarette tax law. (Assignment Seven).

Five

Is the Comenout Allotment defined by 18 U.S.C. § 1151(c)? (Assignment Eight).

Six

Whether the desperate treatment of notice on Indian cigarette shipments but not military cigarette shipments invalidate the notice requirement. (Assignment Nine).

Seven

Does selective enforcement of the Indians charged but not the non Indian engaged in the same activity require dismissal? (Assignment Ten).

III.

STATEMENT OF THE CASE

A. The Affidavits of Probable Cause

The Affidavits of Probable Cause were filed in all the cases in Pierce County, Washington, Superior Court, CR 1-9, 68-76, 140-148 and 197-205.

They are titled as Affidavits but contain no notarization or declarations that comply with GR. Rule 13. All four are identical. They state that the store, named "Indian Country Store", located at 908 River Road in Puyallup, Washington, CR 1, CR 68, CR 140 and CR 197, is owned and operated by the Comenout family. The Affidavits on the next page, CR 2, 69, 141, and 198, state that the "land is held in trust for certain members of the Quinault Nation." This is materially wrong and requires reversal as, since June 4, 2010, the death of Edward Amos Comenout Jr., no Quinault Nation member owns any interest in the land. The next page of the Affidavit cites *Matheson v. Kinnear*, 393 F.Supp. 1025 (W.D. Wash. 1974). The case found as a fact that the same property was purchased from restricted funds of individual Indians and "The land is owned subject to a restriction on alienation." *Id.* at 1027. The case describes the property, purchased for the Comenout family in 1926 and the Indian status of the owner. The *Matheson* case refers to the General Allotment Act and the Quinault Treaty, 12 Stat. 971 (1855). 393 F. Supp. at 1026. The Quinault Treaty, 12 Stat. 971 (1855), at Article Six, allows the President to remove Quinault members from the reservation for permanent homes in the territory. Lee Comenout Sr. is a fully-enrolled Yakama Nation Indian living on the Yakama Reservation, CR 85. Robert R.

Comenout Sr. is a fully-enrolled Tulalip Indian and part owner of the allotment, CR 213, 214. See *State v. Comenout*, 173 Wash.2d at 237. Robert R. Comenout Jr. is a Yakama Indian. See Affidavit of Probable Cause, CR 41, 71, 173 and 200. *State v. Comenout, supra* at 237. Marlene Comenout is an enrolled Yakama Indian. No Quinault Indian owned the land since June 4, 2010, when Edward A. Comenout Jr. died. *State v. Comenout, supra* at 237. None of the owners, since 2010, are Quinault Nation members. Indians who do not live on reservations can own allotments. 25 U.S.C. § 334. The Comenout property was allotted from public lands, not Quinault Tribal lands. The property has a large sign on it that cannot be missed; it states “Indian Country.” A copy of the deed was attached to Defendants’ Memorandum in Support of Motion to Dismiss, dated June 14, 2015, filed in the case. It is attached. It proves that the property was obtained from William Attridge, a Puyallup resident. “Congress nonetheless wanted Indians to be able to obtain public domain homesteads, and, in consequence, the General Allotment Act of 1887 and other earlier statutes authorized trust or restricted allotments for Indians from public lands.” *Cohen’s Handbook of Federal Indian Law*, § 16.03[2][e], page 1076 (Nell Jessup Newton ed. 2012). The Affidavits of Probable Cause, at CR 4, 71, 143 and 200, state that “Gardee family

members” “inherited some of Edward Jr.’s ownership interest.” Lee R. Comenout Sr. and Robert R. Comenout Jr. are brothers and sons of Robert R. Comenout Sr., who is the surviving brother of Edward Comenout Jr., CR 4. The Affidavits, at CR 2, 69, 141 and 198, state that “generally all other businesses in the state of Washington that sell cigarettes to non tribal members are ‘required’ to have a Washington tax paid stamp affixed to every pack of cigarettes.” This legal conclusion is disputed in the argument section of this Brief.

B. The Informations

Originally, the Informations in this case, filed May 22, 2015, in the cases of Robert R. Comenout Jr., Lee Comenout Sr. and Marlene Comenout, CR 10-14, 77-82, 149-153, charged at Count One, that all three defendants violated RCW § 82.26.190(2) by selling and distributing cigarette tobacco items without a license. However, the Comenouts produced a copy of a permanent injunction, filed March 26, 1981, from the 1980 *Colville* case, No. 3868, U.S. District Court, Eastern District of Washington, prohibiting state enforcement of any law under RCW ch. 82.26. Cigarettes are taxed under RCW ch. 82.24; other tobacco items are taxed under RCW ch. 82.26. When the mistake was pointed out by the Comenouts, the Informations were

amended. Robert R. Comenout Sr. was charged a few days later on March 26, 2016. The Information filed against him did not charge violations of RCW § 82.26. All of the amended Informations charge the same six counts.

All the Amended Informations charge all Comenouts with the same crimes. The two Informations filed against Robert R. Comenout Sr. are at CR 206-210 and CR 218-222. Except for dates, they appear to be identical. Count One charges conduct of cigarette business without a license in violation of RCW § 82.24.500. Count Two charges possession of cigarettes without state tax stamps on them contrary to RCW § 82.24.110 2(b) and (4). Count Three charges conspiracy to commit theft by “wrongfully obtaining and exerting unauthorized control over Washington state cigarette tax monies on cigarettes sold from the Indian Country store. Count Four also charges operating a cigarette business without a valid cigarette retailer’s licenses as required by RCW § 82.24.500. Count Five charges possession of over 10,000 cigarettes without state tax stamps affixed as required by RCW § 82.24.110 (2)(b) and 4. Count Six charges conspiracy by obtaining or exerting unauthorized control over Washington state tax monies on cigarettes sold from the Indian Country store. The other three Informations were amended to change dates, Robert Comenout Jr., CR 20-24, 33-37; CR 21, 34,

CR 22, 35, CR 24, 36; Marlene Comenout, CP 150, 177, 151-178, 152-179, 153, 179; Lee Comenout Jr., CP 91, 106, 92-107, 93-107, 94-108.

Counts One and Four involve selling cigarettes without state licenses. Counts Two and Five charge possession of unstamped cigarettes. Count Three and Six charge conspiracy to commit theft for “wrongfully obtaining or exerting unauthorized control over Washington State cigarette tax monies.” The arguments that follow prove that none of the six counts apply to the Comenouts.

The Affidavit of Probable Cause filed in the case, CR 1, establishes that all Defendants are Native American Indians and that the business is located on “land that is held in trust by the United States Government.” The argument part of this Brief will also point out that the Comenouts, even if the state cigarette tax applies, were retailers only. Wholesalers and non Indian consumers are required to pay the tax, not the Comenouts.

IV.

THE DECISIONS BELOW

All the Comenouts agreed to Alford pleas. CR 40-42; CR 112-114; CR 183-185; and CR 241-243. The Appeals are from the Court’s judgment and sentences, CR 43-52; CR 115-124; CR 186-188; and CR 280-281. The

Appeals are based on lack of state court jurisdiction of the Comenouts and the lack of jurisdiction to charge criminal state tax violations against Indian retailers in Indian Country.

V.

ARGUMENT

A. The State had no jurisdiction of the Comenouts.

All the Comenouts entered Alford pleas in Pierce County Superior Court. They are all Native American, fully-enrolled Indians. Robert R. Comenout Sr. is a Tulalip Indian. His sons, Robert R. Comenout Jr. and Lee R. Comenout Sr. are Yakama Indians, taking their mother's Yakama blood quantum. Marlene Comenout is a Yakama and wife of Robert R. Comenout Jr. All are charged with criminal state cigarette tax violations for Indian activity occurring within the public domain allotment 130-1027, an Indian allotment jointly owned with others by Robert R. Comenout Sr. The federal restriction of allotments prevents state and local taxation of Indians. The land was deeded in 1926 to Edward A. Comenout Sr. A copy of the deed, filed in Pierce County, containing the restrictions, states "while the title thereto is in the grantee or heirs, the same shall not be alienated or encumbered without the consent of the Secretary of the Interior."

“It is a venerable, if trite, observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law.” *Miller Bros Co. v. State of Maryland*, 347 U.S. 340, 342, 74 S.Ct. 535, 98 L.Ed. 744 (1954). “Where there is jurisdiction neither as to person nor as to property, imposition of a tax would be *ultra vires and void*.” *City of St. Louis v. Wiggins Ferry Co.*, 78 U.S. 423, 430, 20 L.Ed. 192, 11 Wall. 423 (1870).

The law on lack of state jurisdiction was decided 274 years ago. Before the U.S. Constitution was approved, the English courts held that the colonies had no control over Indians. Robert N. Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434 (1981) states:

State and Indian tribal governments have been increasingly at odds over the legitimate scope of state power in Indian country involving matters of taxation, land use management, wildlife conservation, water regulation, and even criminal law. Since the early colonial period the law has respected the sovereignty and authority of Indian tribes over such matters and has precluded the exercise of state authority in Indian territory.

In support of this statement, Clinton cites the case of *Governor and Company of Connecticut and Moheagan Indians*, 126 (London 1769 opinion of Comm’ns Horsemanden Aug 1, 1743). Clinton, *id.* at 435 then states:

Ever since, one central theme in Indian law has been the effort to protect the autonomy of the Indian tribal community as a separate polity or sovereignty from competing claims to authority asserted by the colonial or state governments. Protection of Indian autonomy was attempted by the Crown in the Proclamation of 1763 and through other efforts and, later by the national government. . . . In order to extinguish any state claim to authority over affairs with the Indian tribes, the framers of the Constitution vested in the Congress the power '[t]o regulate Commerce . . . with the Indian Tribes.' The debates at the Constitutional Convention and later writings indicate that this clause grew out of James Madison's determination to commit the exclusive power over Indian affairs to the federal government.

The clause is U.S. Const. Art. 1, § 8, cl 3. This clause mandates federal uniformity of interstate and Indian commerce by Congressional control. In this sense, the national uniformity of both subjects is preserved.

Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965) rejected state taxation of Indians by adopting the reasoning of *Your Food Stores, Inc. v. Village of Espanola*, 361 P.2d 950, 955-956 (N.M. 1961) "Congress in the exercise of its power granted in Art. 1, s 8, has undertaken to regulate reservation trading in such a comprehensive (sic) way that there is no room for the States to legislate on the subject." *Id.* at 691 f.18. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) also swept away state taxes on Indian reservation residents. Michael Minnis, *Judicially*

Suggested Harassment of Indian Tribes: The Potawatomis Revisit Moe and Colville, 16 Am Indian L.Rev. 289 (1991) refers to Bob Woodward's book, "The Brethren" at 412 (1979). The book related that a Supreme Court Christmas skit by Justice William Rehnquist displeased Chief Justice Burger. Burger assigned Rehnquist only one case for the entire term, *Moe v. Confederated and Kootenai Tribes*. It changed Indian victories so that in most cases the Indians would lose. *Id.* at 289. Regarding *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, Minnis wrote that the state never identified the principle that allowed the court to require collection as a minimum burden. It "created an untenable dichotomy." *Id.* at 290. The untenable dichotomy of *Colville*, 447 U.S. at 159, is now gone from Washington's cigarette tax scheme as the state tax law, updated in 1995 and 2003, now does not "require" the Indian to collect the tax. *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087 (9th Cir. 2011). When the applicable new law and different facts from *Colville* are applied, the conclusion is inescapable. The state had no more authority to arrest the Comenouts and take their property than the state would be able to arrest the operators of the military commissaries at Fort Lewis and McChord Air Force Base and to seize all

their inventory and cash.

Among many other laws, RCW § 2.08.010 applies. The state has no original jurisdiction over cases “in which jurisdiction shall not have been vested exclusively in some other court.” The reason is contained in the case of *Oneida Tribe of Indians v. Village of Hobart, Wis.*, 732 F.3d 837 (7th Cir. 2013). “Federal facilities” including “military bases” “are subject to only as much regulation by states and local governments as the federal government permits. A similar scatter is common in Indian Country, primarily as a result of allotment acts.” *Id.* at 839.

B. The Supreme Court case of *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011) does not control this Appeal.

1. No Quinault Nation member has owned the allotment since June 4, 2010, when the only Quinault member owner, Edward A. Comenout Jr., died.

The Supreme Court *Comenout* decision held that the Quinault Nation cigarette tax contract with the State took precedence over the state statutes. The Court held that the Comenouts did not have a Quinault tribal license so they were not a tribal retailer. *Comenout*, 173 Wash.2d at 240. The Comenouts actually had a Quinault business license. Since the case was later dismissed by the prosecution before trial, this defense and others could not

be presented by Robert R. Comenout Sr. and Jr. The Informations in this case before this Court, were charged in 2015, 5 years after the death of Edward Amos Comenout Jr. CP. 4. The Order of Certification to the Supreme Court in the consolidated Appeals under RCW § 2.06.030, Nos. 39741-2-II and 39761-7-II by Robert Reginald Comenout Sr. and Jr. was signed by Chief Judge Joel M. Penoyar. It certified two issues, they were:

“Does the State have criminal jurisdiction over tribal members selling unstamped cigarettes from a store located on tribal trust land that is not within the borders of a reservation? Are the appellants exempt from collecting State cigarette taxes as “Indian retailers” under RCW 82.24.295(1)?”

The statement “tribal trust land that is not within the borders of a reservation” is wrong. The land is a public domain allotment. It has never been “tribal”. It is a restricted allotment. The certification “tribal trust land” may have misled the Supreme Court as it assumed Quinault Nation control. The second question also was dependent on a Quinault compact. As applied here, is beyond dispute that no Indian tribe owned or controlled the Allotment. The deed to the Comenout ancestor is from William Attridge, Grantor, of Puyallup. The site was never tribal trust land and in 2015 could not possibly be under any control of the Quinault Indian Nation.

2. The site cannot be governed by any Indian tribe.

Cohen's Handbook of Federal Indian Law (Strickland ed. 1982),

Chapter 5 § B2, page 278 states:

Some small Indian reservations have been established for Indians lacking a functioning social organization at the time, and in most instances the residents have been able to organize a governmental structure. As a result, most areas of Indian country are subject to tribal authority.

The principal exception is certain Indian allotments outside reservations. The majority of off-reservation allotments are governed by functioning tribal governments but a substantial minority are not. The latter are statutory Indian country and are subject to applicable federal statutes, which preempt state laws. (Underlining added.)

Miami Tribe of Oklahoma v. U.S., 656 F.3d 1129 (10th Cir. 2011) holds that even if the tribe is active and governs the site, it still has no jurisdiction of members of the tribe who occupied a restricted allotment. Since the land was no longer on an Indian reservation, the Indian tribe could not have any jurisdiction of the restricted allotments. The tribe accepted the owners as tribal members and governed the allotments. The Court held the Miami Tribe cannot “exercise jurisdiction” under § 2216(a) without a “Congressional grant of jurisdiction over the Reserve.” *Id.* at 1145. “The tribe cannot create Indian reservation lands ex nihilo by adopting landowners into the tribe and claiming all the new member’s property.” *Id.* at 1145 f. 16 (ex nihilo means creating out of nothing). Congress quit Indian treaty making in 1871. 25 U.S.C. § 71.

Judge Posner, in *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 732 F.3d at 837 (7th Cir. 2013) states that the General Allotment Act, 25 U.S.C. § 331, allotted lands to Indians “to individual families to liberate them from tribal ownership that Congress in that era considered socialistic to encourage their assimilation into mainstream American life.” *Id.* at 839.

3. The State cannot govern the allotment. It has no jurisdiction to arrest Indians for activity on the allotment.

Confederated Tribes of the Colville Indian Reservation v. State of Washington, 938 F.2d 146, 149, dismissed a state patrol arrest on reservation land for lack of jurisdiction of the Indian.

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), decided before the 1995 and 2003 state cigarette tax revisions, did not allow the Department of Revenue to go onto Indian land. In *Colville*, the state contended that they legally could do what they did here, go into Indian country. *Id.* at 162. The *Colville* court would not decide the entry into Indian Country as it “is not properly before us.” *Ibid.* at 162. Immunity from state tax “applies to all Indian country and not just formal reservations.” *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993), “[T]he intent of Congress,

as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments.” *Id.* at 125. In *Sac and Fox*, the state argued that the *Colville* case, 447 U.S. 134, did not apply to allotments. Some of the members lived on off reservation allotments. *Sac and Fox*, *supra* at 128. The Court rejected this argument, stating: “Absent explicit congressional direction to the contrary, we presume against a State’s having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands or dependent Indian communities.” *Supra* at 128.

4. The Comenout case decided only two narrow issues. Validity of a state search warrant to arrest Indians in Indian Country was never a submitted issue and was not covered in the Opinion.

Confederated Tribes of Colville Reservation v. State of Washington, 938 F.2d 146, 149 (9th Cir. 1991) dismissed a state officer arrest on reservation land. *United States v. Peltier*, 344 F.Supp.2d 539, 546 (D.C.E.D. Mich. 2004) invalidated a state warrant and suppressed all evidence as the state police had no authority to obtain a warrant from a state court judge. *Id.* at 542. “King used this information to obtain a search warrant from a State court judge.” *Id.* at 542. The state contended that the extent of Indian country was unclear, “that

the resulting confusion requires that law enforcement personnel pursue their investigations, make their arrests, and sort out questions of jurisdiction later.” *Id.* at 546. This argument was rejected by the court. “The crucial element in due process claims is police overreaching.” *Id.* at 548. “The state court did not have authority to issue the search warrant to search premises within Indian country.” *Id.* at 549.

In *U.S. v. Baker*, 894 F.2d 1144 (10th Cir. 1990) a state search warrant obtained by a state deputy sheriff was void. The search was to investigate alleged methamphetamine on the property that was within Indian country. *Id.* at 1146. The federal conviction was reversed as the warrant was issued by “an unauthorized state tribunal.” *U.S. v. Anderson*, 857 F.Supp. 52 (D.C.S.D. 1994) granted a motion to suppress evidence by state parole officers who conducted a warrantless search of his home. The defendant was an Indian and the home was in Indian country. *Cohen’s Handbook of Federal Indian Law* [9.08] at page 775 (Nell Jessup Newton ed. 2012) states, “it remains clear that state officers have no authority to investigate crime involving Indians occurring within Indian country.” Whether the site is on land in which there is no law is not relevant. This issue was answered in *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) holding that state officers had no jurisdiction to arrest an Indian in Indian

country as defined in 18 U.S.C. § 1151. It was not clear that any officer of any government enforced law on the site. *Id.* at 1353. It was deemed to be Indian Country within 18 U.S.C. § 1151. *Id.* at 1352. The sheriff stated that he was not aware of any trust land in the county, *id.* at 1355. *Ahboah v. Housing Authority of Kiowa Tribe of Indians*, 660 P.2d 625 (Okla. 1983) was cited with approval in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 125, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993). *Ahboah* held that a state process served in off reservation allotments could not be valid as the court had no jurisdiction. The case rejected both territorial and adjudicatory jurisdiction. The allotments were held to be within the definition of 18 U.S.C. 1151(c). *Id.* at 627-629.

5. The *Comenout* case was dismissed by the Prosecution.

The case was appealed by the Defendants on failure to grant the Motion to Dismiss the Informations. Since the state dropped the case ex parte long before trial, the actual facts were never presented. The *Comenout* case notes that Edward Comenout died and was dismissed from the case. It notes that Robert R. Comenout Sr. is a Tulalip Tribe Member and Robert Comenout Jr., “is an enrolled member of the Yakama Nation.” *Id.* at 237.

The effect of an ex parte dismissal is to leave the parties as though no

action had been brought. “[D]ismissal, once filed automatically terminates the action.” *Commercial Space Management Co. Inc., v. Boeing Co. Inc.*, 193 F.3d 1074, (9th Cir. 1999) “The effect is to ‘leave [] the parties as though no action has been brought.’” *Id.* at 1077 (quotation marks altered). *U.S. v. Real Property*, 545 F.3d 1134 (9th Cir. 2008), *Pueblo of Santa Ana v. Nash*, 972 F.Supp.2d 1254 (D.C.N.M. 2013). Both hold that voluntary dismissal cannot be precedent. “The effect of the filing ‘is to leave the parties as though no action had been brought.’ ” *U.S. Real Property, supra* at 1145 (internal quotes omitted). “There is nothing left to adjudicate” *Szabo Food Service Inc., v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987). A decision is final when it ends the litigation on the merits. Collateral estoppel only applies when “the earlier proceeding ended in a judgment on the merits.” *Christensen v. Grant County Hospital*, 152 Wash.2d 299, 307 (Wash. 2004); *Schibel v. Eymann*, 193 Wash.App. 534, 541, 372 P.3d 172 (Div. III, 2016).

6. The Comenout Case is not Res Judicata.

When different tax periods are involved and intervening changes in the law occur, res judicata does not apply. *Dot Foods, Inc. v. State Dept. of Revenue*, 185 Wash.2d 239, 254, 372 P.3d 747 (Wash. 2016); *Hyan v. Hummer*, 825 F.3d 1043, 1046 (9th Cir. 2016). Collateral estoppel and res

judicata cannot apply unless the court of competent jurisdiction has entered a “final decision on the merits.” *C.I.R. v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 92 L.Ed 898 (1948); *Schibel v. Eymann*, 193 Wash.App 534, 372 P.3d 172 (Div. III, 2016). Further, the Supreme Court, in *Comenout*, never mentioned the *Yakama* case, 658 F.3d 1078, or had the benefit of the later decided *Chehalis* case. *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013).

7. Congress did not delegate state tax jurisdiction under Public Law 280 to Public Domain Allotment No. 130-1027 or any other allotment.

State v. Comenout, 173 Wash.2d at 238 assumed that Public Law 280 included a delegation from Congress for state taxation of Indians. This assumption led the Court to a completely wrong decision. The Court followed *State v. Cooper*, 130 Wash.2d 770, 928 P.2d 406 (Wash. 1996), a child molestation case. Basically the error is two mistakes, the first is that the Comenout land was removed by the BIA from the Quinault Reservation. It was purchased from an individual land owner. The Comenout land was transferred by the BIA. Congress enacted the off reservation allotment laws to disregard tribal influence. “The Secretary of Interior is authorized, in his discretion, to acquire through purchase . . . any interest in lands, water rights, or surface

rights to lands, within or without existing reservations . . . and such lands or rights shall be exempt from State and local taxation.” 25 U.S.C. § 5108 (Underlining added).

Public Law 83-280 Act of August 15, 1953, ch 505, 67 Stat. 588, was a transfer of jurisdiction from the federal government to the states. It was codified in three sections, 18 U.S.C. § 1162, 28 U.S.C. § 1360 and 25 U.S.C. §§ 1321-1326 (Pub. L. 83-280). The jurisdictional part of P.L. 280, 28 U.S.C. § 1360, had three subsections. The (a) part granted civil and criminal state jurisdiction to six states. Washington was an optional state allowing adoption by state statutes. Washington only applied for jurisdiction in six subject areas. RCW § 37.12.010. State taxation is not a subject area. *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) unequivocally holds that P.L. 280 extended civil jurisdiction to Indian reservations but did not grant jurisdiction to tax personal property of Indians. The 28 U.S.C. 1360(b) section specifically denied tax jurisdiction “nothing in this section shall authorize the alienation, encumbrance or taxation of any real or personal property. . .” that “is subject to a restriction against alienation imposed by the United States. . .or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto.” The off reservation allotments were

governed by another set of laws. The *Comenout* decision also compounded the error by assuming, without facts, that the Quinault Indian Nation had governmental authority over the allotment. The BIA governs the allotment. Probably the biggest mistake in the case was failure to recognize the State Constitution, Art. XXVI § 2, that disclaimed any rights to Indian lands “until title thereto shall have been extinguished by the United States. . .and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.” (Underlining added). Public Law 280 does not allow state taxation. “Whatever powers of taxation or requisition states have in Indian country, see chapter 9, must be derived from some other source; Public Law 280 confers no such authority.” William C. Canby Jr., *American Indian Law in a Nutshell*, page 275 (6th ed. 2014); *Cohen’s Handbook of Federal Indian Law* 6.04 [3][b] page 551 (Nell Jessup Newton, ed. 2012) states “One provision of Public Law 280 precludes application of state laws that would allow for the ‘alienation, encumbrance or taxation’ of Indian trust or restricted property.” (Citing 18 U.S.C. § 1162(b), 25 U.S.C. §§ 1321(b), 1322(b), 28 U.S.C. § 1360(b).)

The *Comenout* Opinion concluded that Congress delegated state jurisdiction except for lands and Indians within the boundaries of Indian

reservations. *Id.* at 238, citing RCW § 37.12.010. However, the court did not mention that jurisdiction was limited to that delegated under Public Law 280. RCW § 37.12.050. Therefore, the retrocession did not apply to allow state taxation of lands outside the reservation. 173 Wash.2d at 240. This would be totally contrary to *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013) and 25 U.S.C. § 5108.

C. The State cigarette tax law violates equal protection of the Comenouts. The same exemption must apply to the Comenouts pursuant to the remedy allowed when invidious discrimination exists.

The disparate treatment of exemptions from state tax cannot violate equal protection. *Associated Grocers, Inc. v. State*, 114 Wash.2d 182, 188, 787 P.2d 22 (Wash. 1990). When the discrimination invalidates the statute, the omitted party may be added to the statute to include the persons excluded. *Moritz v. C.I.R.*, 469 F.2d 466, 470 (10th Cir. 1972).

The state cigarette tax law, RCW § 82.24.250(7)(a)(b)(c) allows wholesalers and military bases to sell and transport unstamped cigarettes without notice. Indians have to give notice. The state regulation, WAC 458-20-190 6(b) states “(b) **Cigarette Tax Stamps**. Washington cigarette tax stamps must generally be affixed to all cigarettes sold to persons residing

within or conducting business on federal reservations. However, such stamps need not be affixed to cigarettes sold to the United States or to any of its entities . . . sold to authorized purchasers for use on such reservations.” An authorized person is anyone who buys from armed forces commissaries. RCW § 82.24.250(7)(a); WAC 458-20-186, Part 1(103)(b)(ii), allows military personnel or retired military personnel and their dependents to purchase unstamped and untaxed cigarettes for their own consumption. There is no limit of the amount a person can purchase. WAC 458-20-186, Part VIII (803), allows Indian retailers to sell exempt cigarettes for “personal consumption” to Indians, however they must be stamped “exempt”. WAC 458-20-192(9)(a)(ii) only allows sale or delivery to Indians if approved in advance by the state and then only on quotas based on the “. . . national average cigarette consumption per capita.” Indian retailers must give advance notice while in interstate or Indian commerce in order to bring unstamped cigarettes into the state. RCW § 82.24.250(7)(c). Military deliveries are not required to give notice. RCW § 82.24.250(7)(b). The entire prosecution of the Comenouts is premised on failure to give notice. If notice is given, the cigarettes are not “deemed contraband.” RCW § 82.24.250(4). *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004), struck down a state statute applying only to off

reservation travel of Indian emergency vehicles. The statute was precluded by “the preemptive force of federal Indian law.” *Id.* at 701. Hauling to military bases is never deemed contraband but the “deemed contraband” lack of notice triggers all prosecutions against Indians. The notice must be given before commencement of transportation which is always outside the state. RCW § 82.24.250(1)(b). *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) holds that interstate notification is invalid under the commerce clause. Interstate transportation does not require notice to any state. Indian transportation to another Indian country to Indians is not interstate commerce. *State of New York v. Mountain Tobacco Company*, 2016 WL 3962992 at *87 (D.C.E.D. N.Y. 2016; *Mahoney v. State Tax Commission*, 524 P.2d 187, 191 (Idaho 1973). *State ex rel Wasden v. Native Wholesale Supply Co.*, 312 P.3d 1257, 1261 (Idaho 2013) goes further and holds that Indian-to-Indian sales from an Indian wholesaler of the Seneca Nation in New York to an Indian on his reservation in Idaho did not require an Idaho tobacco wholesaler permit. The disparate treatment invalidates the notice statute.

D. Only Wholesalers Can Buy Tax Stamps.

Since the 2003 amendment, (Ch. 114 58th Legislature 2003 Reg. Sess) added RCW § 82.24.030(3). RCW § 82.24.030(3) as changed in 2003, states

“(3) except as provided in this Chapter, only wholesalers may purchase or obtain cigarette stamps. Wholesalers may not sell or provide stamps to any other wholesaler or person.” (Underline added). A retailer who ships “outside of this state or to a federal instrumentality” can ship them without stamps. RCW § 82.24.040(3) or to an Indian tribal organization 040(5). The Comenout property is both an Indian tribal organization and a federal instrumentality. RCW § 82.24.010(6). Under RCW § 82.24.030(4) stamp rolls must be kept and used for later purchases. They usually are purchased from banks at \$30,000 per roll. The Informations do not mention that only a wholesaler can stamp and cannot transfer a stock of stamps or that only sales by Indians to non Indians are taxable. What does a non Indian purchaser do when he buys from an Indian? The Washington State Department of Revenue Cigarette Tax Publication, last updated in 2015, (Google 2016) tells us: “If a consumer buys cigarettes from an out-of-state retailer (i.e. while visiting Oregon or Idaho) or from an in-state tribal retailer (without a Washington or tribal tax paid stamp affixed), Washington’s cigarette and use taxes must be paid directly to the Department of Revenue on a Tax Declaration for Cigarettes form within 72 hours of possession of the cigarettes. The tax declaration form is available on our website dor.wa.gov or by calling 1-800-647-7706.” The general cigarette

tax law *State v. 483 Cases, More or Less, of Assorted Brands of Cigarettes*, 96 A.2d 568, 571-572 (S.C.N.H. 1953) holds that until a taxable sale occurs, unstamped cigarettes can be possessed in a state. The Comenouts are completely exempt from the cigarette tax law under RCW § 82.24.080(2). *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087 (9th Cir. 2011). A state wholesaler's license must be obtained, RCW § 82.24.500, but Indians do not have to pay state cigarette taxes or obtain state tobacco licenses. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). "For these reasons, the personal property tax on personal property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes which provide the basis for decision with respect to such impositions. *McClanahan*, *Supra*. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)." *Moe* did not establish any limit to the amount of cigarettes Indians could buy. At most, the Comenouts would have to hunt for a stamping agent and run the cigarettes through a stamping machine. This is not alleged on the Informations

and would be more than a minimum burden. A good analogous case is *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). The state of South Carolina required shrimp fishermen to stamp their catch caught within the three mile limit of South Carolina. They had to stamp their catch before transportation to another state. *Id.* at 391. The state admitted that this was a burden. *Id.* at 404. The court voided the statute as a commerce clause violation. *Id.* at 409. *State of New York v. Mountain Tobacco Company*, 2016 WL 3962992 at *17 (D.C.N.Y 2016), indicates that an unlicensed person who intends to sell into a state coming from Indian country must find a state stamping agent. The Informations in this state charge possession without stamps, CP 11, selling without a license and obtaining tax moneys of the state. CP 33-37, 105-109-, 176-180 and 218-222. *State of Oklahoma v. Brooks*, 763 P.2d 707, 710 (Crim.A Okla. 1988) dismissed a cigarette tax information “because the Informations in this case did not relate specifically to appellees’ cigarette sales to non Indians.” The Informations in this case also did not mention that the tax only applied to sales to non Indians. A retailer cannot put stamps on the packages. RCW § 82.24.030(2) and (3). *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1088 (9th Cir. 2011). *Yakama* also holds that consumers are “legally obligated to pay the tax.” *Id.* at 1089. The affidavit of probable cause never included the fact that

the Comenouts are not able to buy or affix tax stamps, need no state license and that the non Indian consumer is the one who has to pay the tax by form filed with the Department of Revenue. The information also wrongly fails to mention that the Puyallup property is a restricted Indian allotment. If the cigarettes are not stamped, the non Indian consumer buying from Indians in Indian country has to pay the tax. The state either gets its tax from the wholesaler or the non Indian consumer. The Comenouts could not buy stamps, so the non Indian buyer has to pay the tax. Only the purchaser from an Indian knows whether he is Indian or not. J. Mark Keller, for all the Comenouts know, may be Indian. As Indians, the Comenouts are exempt from purchasing a state tobacco license. Counts One and Four require state licenses. Count Two is the failure to buy stamps and Count Three and Six charge a conspiracy to control state tax money. Count Five charges possession without stamps that the Comenouts cannot buy. The charges do not apply to the Comenouts who are alleged to be Indian retailers. Indian law is schizophrenic. *U.S. v. Lara*, 541 U.S. 193, 219, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). The prosecution seeks to shoot first and ask questions about the change in the law and to examine the new facts of this case from earlier cases later. That is what the officers did in *U.S. v. Peltier*, 344 F.Supp.2d 539, 546 (D.C. Mich. 2004), but it did not work. The Fourth Circuit in *U.S. v. Critzer*, 498 F.2d 1160 (4th Cir.

1974) dismissed an Indian criminal case stating that the tax liability should be first determined “not the prosecution, with attendant potential loss of freedom of one who is the ward of her government.” *Id.* at 1164. “It is settled that when the law is vague or highly debatable, a defendant - actually or imputedly - lacks the requisite intent to violate it.” *Id.* at 1162. Here, we have a recent federal case clearly stating that the Comenouts, Indians in Indian country, cannot be criminally liable for not collecting the state cigarette tax. “A criminal proceeding pursuant to Section 7201 is an inappropriate vehicle for pioneering interpretations of tax law. The conviction is reversed.” *U.S. v. Garber*, 607 F.2d 92, 99 (5th Cir. 1979). *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 687, 440 P.2d 442 (1968) states that congress has to solve the state tax on Indians problem. The requirement violates constitutional equal protection and also interstate commerce laws by requiring pre-commencement notification in interstate commerce.

E. The subsequent decisions and 1995 and 2003 changes to the State cigarette tax statutes make the *Colville* case and the attempted effect of *State v. Comenout* obsolete.

Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire, 658 F.3d 1078 (9th Cir. 2011) changes the *Colville* decision of “require”(447 U.S. at 159) to “economic choice left to Indian retailers.” *Yakama*, *Id.* at 1087. *Confederated Tribes of Chehalis Reservation v. Thurston*

County Board of Equalization, 724 F.3d 1153 (9th Cir. 2013); *State of New York v. Mountain Tobacco Company*, 2016 WL 3962992 (U.S. D.C.E.D. N.Y. 2016); *State v. Jim*, 173 Wash.2d 672, 273 P.3d 434 (Wash. 2012); and 2016 unpublished decision in the Washington State of Appeals Division Three eliminate the jurisdiction of *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011). “If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation.” *C.I.R. v. Sunnen*, 333 U.S. 591, 600, 68 S.Ct. 715, 92 L.Ed.2d 898 (1948). The Comenout decision does not cite *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011), a case decided a few months before *Comenout*. *Id.* at 1082 reviews RCW § 82.24.080(4). Three of the four Comenouts in this case are Yakama Indians. Lee R. Comenout Sr., a Yakama Indian, also lives on the Yakama Indian reservation. CR 85. *Yakama*. Construing the revisions, the Court held “while it would be prudent for any Indian retailer to pass on and then collect the tax from consumers, the Act does not *require* it; rather that is an economic choice left to the Indian retailers.” *Id.* at 1087. In support, the opinion references RCW § 82.24.900. The Court noted the provision that added RCW § 82.24.030(3), “only licensed wholesalers may purchase or obtain cigarette stamps.” Wholesalers shall not sell or provide stamps to any other wholesaler

or person. The *Yakama* opinion then states “Moreover, by precluding retailers from absorbing any portion of the cigarette tax, it is implied that they will need to pass on the entirety of the tax to consumers.” *Ibid.* at 1088. The *Yakama* Court concluded that the intent of the 1995 changes, which are in effect in this case, “is for consumers to be legally obligated to pay the cigarette tax.” *Id.* at 1089. The incidence of state tax on Indians “inescapably is a question of federal law.” *Coeur d’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 682 (9th Cir. 2004). *State of New York v. King Mountain Tobacco Company*, 2016 WL 3962992*14, addresses this issue on a similar New York law by indicating that an “out-of-state Indian shipper must sell to licensed stamping agents.” The Informations in this case do not allege failure to sell to a licensed stamping agent. The *Yakama* Court held the common carrier could possess unstamped cigarettes and no tax applied. “A fair construction of these provisions leads to the conclusion that an Indian retailer will be excluded from paying the tax for sales to members. The language also indicates that if an Indian retailer ever found itself facing a State collection effort for the retailer’s non payment of the tax, the retailer would be shielded from civil or criminal liability, except in the instance where the Indian retailer has failed to transmit the tax paid by the consumer and collected by the retailer.” *Yakama*, 658 F.3d at 1088 (underlining supplied). “Indeed, numerous provisions in the Act are written

with the purpose of excluding Indian tribes and their members from compliance with the Act. After all, the cigarette tax applies only to the ‘first taxable event and upon the first taxable person’ under RCW § 82.24.080. There is no dispute between the parties that as between an Indian retailer and a non-Indian purchaser, the latter is the *first* taxable person.” *Id.* at 1087. The case, and many others, holds that the incidence of tax is on the consumer, not the Indian retailer, *id.* at 1089.

J. Mark Keller’s Probable Cause Affidavit, CP 1-9, never mentioned that the non Indian consumer was to pay the tax.

F. Federal law preempts the issues of state taxation of Indians.

In *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), the Court held that the state law, RCW § 84.04.080 defining a building as personal property when on federal land was preempted. “Therefore, it is irrelevant whether permanent improvements constitute personal property under Washington law.” *Id.* at 1158.

State v. Jim, 173 Wash.2d 672, 273 P.3d 434 (Wash. 2012) held that the state courts have no criminal jurisdiction over a Yakama Indian violating state fishing laws. “The State does not dispute that the site is tribal land.” *Id.* at 680. The land is a fishing site reserved to members of four tribes, two of which are located in Oregon. Nevertheless, the Court held that the land has reservation

characteristics, hence, Maryhill was a “reservation”. *Id.* at 685. Congress eliminated future reservations in 1871 (25 U.S.C. § 71); *Comenout* was distinguished on the basis that “Maryhill is unique from allotment land” because it was set aside by Congress for tribes, not an individual. An Indian individual was arrested. The distinction is also illogical as the definition of Indian Country, 18 U.S.C. § 1151(a) includes reservations and allotments. 18 U.S.C. § 1151(c), RCW § 82.24.010(6) and 25 U.S.C. §§ 5126 (1) and (3), 5125, 5012. All of the law verifies that Indian preemption is a federal question. RCW 82.24.010(6) unequivocally defines Indian Country by adoption of 18 U.S.C. § 1151, a definition that includes Indian allotments. The state law authorizing cigarette compacts admits that a business owned and operated by the Indian person in whose name the land is held in trust needs no license. RCW § 43.06.455(14)(b)(iii). Allotment lands carved out of public lands by the BIA are governed by 25 U.S.C. § 5108. The state law recognizes allotments.

G. The Informations selectively prosecute the Comenouts all Indians, but do not prosecute Martina Garrison, a non Indian. The Prosecution should be dismissed on the basis of selective prosecution.

The Affidavit of Determination of Probable Cause, CP 1-9, at pages 6 and 7, states that Martina Garrison is an owner of the Indian Country Store

“willed to her by Edward Comenout Jr.” The BIA Order Approving Will and Decree of Distribution, No. P000086947 IP, dated December 31, 2012 in the Estate of Edward R. Comenout Jr., states that Martina Garrison is a non Indian. The Affidavit, at pages 6 and 7, also notes that “Denise Joy (sic) Winnier works for Garrison” and that “Garrison orders the cigarettes for the business.” Two bank employees recognized photos of Garrison as “one of the persons who made deposits to the ICSS bank account. . . .Garrison was present during the execution of the Federal Search Warrant on September 19, 2012.” The Motions to Dismiss, CP 87, CP 215, states the state notes that “a non Indian, Martina Garrison, was an active participant of sales” the state did not prosecute her. The Informations should be dismissed as they are selective prosecution. The allotment statute, 25 U.S.C. 349, expressly states “no territory shall pass or enforce any law denying any such Indian within its jurisdiction. The equal protection of the law.” Plaintiffs discriminated in intent, effect and purpose against the Comenouts, who are all Indians, but did not arrest Martina Garrison, a non Indian. The Comenouts and Garrison were similarly situated, as the alleged conduct was the same. Garrison was not prosecuted. *State v. Munguia*, 107 Wash.App 328, 339, 26 P.3d 1017 (Div. III, 2001); *State v. Talley*, 122 Wash.2d 192, 858 P.2d 217 (1993); *United States v. Mumphrey*, ___F.Supp.3d ___, 2016 WL 3548365 at *6, (D.C. Cal. 2016) apply. The state’s admissions

in the Probable Cause Affidavit establish all the needed facts. “The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races have been prosecuted, but were not.” *U.S. v. Armstrong*, 517 U.S. 456, 469, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996).

H. The allotment is Indian Country.

Congress exclusively governs Indian country, including the Comenout allotment. The Washington Constitution, Art. 26, Second, disclaimed all right to Indian lands and reiterated that they “remain” in the “absolute jurisdiction and control of” the congress of the United States. The disclaimer was not limited to Indian reservations. The criminal Informations in these cases all emanate from state cigarette tax violations. RCW § 82.24.010(6) adopts the federal definition “for purposes of this chapter ‘Indian country’ is the same manner as set forth in 18 U.S.C. Sec 1151.” The statute is imprecise. It defines an Indian tribal organization as including a tribal member operating on his allotment. Robert R. Comenout Sr. does not have to reside on the reservation of his membership. 25 U.S.C. § 334. The allotment can be a restricted allotment exempt from state taxes. 25 U.S.C. § 349; 25 U.S.C. § 5108, 18 U.S.C. § 1151. 18 U.S.C. § 1151 has three parts, (c) includes restricted trust allotment No. 130-1027. Indian crime on a 18 U.S.C. § 1151(c) allotment is

exclusively federal. See *Magnan v. Trammell*, 719 F.3d 1159, 1176 (10th Cir. 2013) and *In re Denetclaw*, 320 P.2d 697, 700 (Ariz. 1958). Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal jurisdiction over felonies or misdemeanors committed by an Indian in Indian country including state law violations is exclusively in federal court. *U.S. v. Sosseur*, 181 F.2d 873, 875 (7th Cir. 1950) *Id.* at 303.

This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations new ‘distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States’. *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 557, 8 L.Ed. 483 (1832).”

In *U.S. v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109 (1886) the Supreme Court held that the case was within federal, not state jurisdiction. The Court stated: “they owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.” *Id.* at 384. Indian allottees do not have to pay taxes on their personal machinery or cattle. In *U.S. v. Pearson*, 231 F. 270 (D.C. S.D. 1916), the allotments were restricted. *Id.* at 277-8. The government issued the allotments to “encourage habits of industry and reward

labor” and to prepare them “for assuming the habits of civilized life.” *Id.* at 278. *Cree v. Flores*, 157 F.3d 762, (9th Cir. 1998) held that the Yakamas had a right, off reservation, to “transport goods to market over public highways without payment of fees.” *Id.* at 769. Three of the four Comenouts are Yakama Indians. Stamping eggs imported into the state with a postal code was held a violation of the dormant commerce clause in *United Egg Producers v. Department of Agriculture of the Commonwealth of Puerto Rico*, 77 F.3d 567, 572 (1st Cir. 1996). *Mahoney v. State Tax Commission*, 524 P.2d 187, 191 (Idaho 1973) applies the Indian commerce and interstate commerce clause to deny state jurisdiction. *State ex rel. Wasden v. Native Wholesale Supply*, 312 P.3d 1257 (Idaho 2013) held the same way. *Red Earth LLC v. U.S.*, 657 F.3d 138, 143 (2nd Cir. 2011) required nexus in a state to require cigarettes destined across state line to an Indian reservation to be reported. *State of New York v. Mountain Tobacco Company*, 2016 WL 3962992 at *6 (D.C.N.Y. 2016) and *Ward v. New York*, 291 F.Supp.2d 188, 207 (D.C. N.Y. 2003) refuses to apply state law to shipments onto an Indian reservation to Indians and especially Indian to Indian in Indian Country commerce. If anything more is needed, *Tohono O’odham Nation v. City of Glendale*, 804 F.3d 1292, 1297 (9th Cir. 2015) supplies it. Federal obstacle preemption, U.S. Const., art. VI, cl. 2, invalidates contrary state law.

I. The land where the activity took place is a restricted trust allotment and clearly Indian Country. The State has no adjudicative jurisdiction to tax Indian owner activity on the property.

25 U.S.C. § 2201(4)(I) defines the allotment, “‘trust or restricted lands’ means lands. . .or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.” 25 U.S.C. § 2201(4)(ii) also defines an interest in the land. The statute, 25 U.S.C. § 2201(2)(A), defines Indian as any member of a tribe or is an owner (as of October 27, 2004) of a trust or restricted interest in land. The Comenout deed states: “the same shall not be alienated or encumbered without the consent of the Secretary of the Interior.” 25 U.S.C. § 349 states in part, a patent shall be issued. “. . .and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.” 25 U.S.C. § 349. The restrictions continue until otherwise directed by Congress. 25 U.S.C. § 5102.

J. The site is defined as Indian Country and part of the same statute that defines Indian reservations.

Indian Country is defined in 18 U.S.C. § 1151. It has three parts. “(a) all lands within the limits of any Indian reservation. . .(b) all dependent Indian communities and (c) all Indian allotments.” (c) applies. *Solem v. Bartlett*, 465 U.S. 463, 467, n. 8, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), held that the state had no jurisdiction to charge an Indian with a rape crime occurring in Indian

country. “Regardless of whether the original reservation was diminished, Federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. See 18 U.S.C. § 1151(c).” The deed states Allotment Tract No. 1027, Code 130. The State cigarette tax law, RCW § 82.24.010(6) adopts 18 U.S.C. § 1151. “For purposes of this chapter, ‘Indian Country’ is defined in the manner set forth in 18 U.S.C. § 1151.”

25 U.S.C. § 345 confers U.S. District Court federal jurisdiction to an allottee to defend his rights. It states in part “all persons who are in whole or in part of Indian blood may defend any suit in relation to their right thereto in the proper district court of the United States.” 28 U.S.C. § 1353 provides that the U.S. District Court has “original jurisdiction.” *Wesley v. Schneckloth*, 55 Wash.2d 90, 346 P.2d 658 (Wash.1959) is binding precedent. Wesley was a Yakama Indian charged in state court with grand larceny on the Yakama Reservation. The holding was that the state court was bound by federal law and had original exclusive jurisdictions in federal court. The Court followed *Dickson v. Carman*, 270 F.2d 809 (9th Cir. 1959), a case where the crime was committed on a public domain allotment, defined in 18 U.S.C. § 1151(c). See lower court opinion. 165 F.Supp. 942, 945 (D.C. Cal. 1958). The case was heard twice by the Supreme Court of California that denied relief. *Dickson*,

270 F.2d at 809 states:

The petitioner is an Indian. In 1950 he was convicted by a California Superior Court of the murder of one Dan McSwain, also an Indian. The crime was committed on land which was at the time allotted to Indians from the public domain and held in trust for the Indians by the federal government.

The exhaustive opinion of Judge Goodman leaves nothing to be added, and his judgment is affirmed. D.C.Cal., 165 F.Supp. 942.

State v. Condon, 79 Wash. 97, 139 P. 871 (Wash. 1914) also applies.

Unpatented allotment owners on the diminished reservation charged with horse stealing in state court was dismissed as exclusive jurisdiction was in federal court. *Id.* at 873.

In *Boisclair v. Superior Court*, 51 Cal.3d 1140, 801 P.2d 305 (S.C. Cal. 1990), a non Indian business sought a right of easement over trust land. At least part of the land was off reservation trust land. The Court concluded “As long as the Indian party to the litigation claims that the property is Indian trust or allotted land, the dispute may be characterized as one concerning ownership and possession of Indian land, and is therefore barred from state court jurisdiction.” *Id.* at 314.

In *Armstrong v. Maple Leaf Apartments, Ltd.*, 508 F.2d 518 (10th Cir. 1974), involved restricted land owned by an Indian descendant of an allottee of

the land. The federal court preempted the state court “If the state court were to act over the objection of Mrs. Armstrong, it would be acting outside the law and without jurisdiction.” *Id.* at 525.

In *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013), Magnan argued that his crime occurred on an off reservation allotment defined in 1151(c) and exclusive jurisdiction of the crime was in federal court, not state courts. *Id.* at 1163. The Court agreed and Magnan, who had been sentenced to death by a state court, was released. The conviction was dismissed for lack of jurisdiction. The court defined Indian Country to include Indian allotments. *Id.* at 1167.

In *Ex parte Van Moore*, 221 F. 954 (D.C.S.D. 1915) dismissed a state court murder charge against an Indian on an allotment. *Id.* at 963. The Opinion states “It is manifest that Indian lands, or the lands of an Indian within a reservation or on the public domain, all come in the same category, all such lands are equally Indian country.” *Id.* at 970. In *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) the Court stated, in a footnote [footnote 2, at page 427], “On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are ‘Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.’ 18 U.S.C. § 1151(c). (Underlining added).

State v. Klindt, 782 P.2d 401 (Okla. Cr. 1989), was not a major crime. It was a state charge of assault that occurred at an Indian smoke shop. The land was leased by the tribe from an Indian allottee. The court held “we have examined the record and find the trial court did not abuse its discretion in finding that the lands in question are Indian country as defined by 18 U.S.C. § 1151(c).” *Id.* at 404. The case was sent back to determine whether the defendant was an Indian. If he was, the case would be dismissed.

In *U.S. v. Jewett*, 438 F.2d 495 (8th Cir. 1971), the deed of the allotment proved that the land was within the definition of Indian country, 18 U.S.C. § 1151(c). The land involved in *U.S. v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996), was an allotment outside of the Navajo Indian Reservation and was Indian country as defined in 18 U.S.C. § 1151(c). *Id.* at 1039 and footnote 1. In *U.S. v. Sands*, 968 F.2d 1058 (10th Cir. 1992), the court held that the state had no jurisdiction over an Indian defendant for a crime on an allotment. It was held to be within the definition of 18 U.S.C. § 1151(c).

K. As enrolled Indians, the Comenouts could possess unstamped cigarettes.

The transportation of cigarettes would not allow confiscation as the automobile is not contraband per se. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965), settled the

issue in 1965 by holding that an automobile is “not intrinsically illegal in character.” *Id.* at 700. “There is nothing even remotely criminal in possessing an automobile.” *Id.* at 699. See also *State v. Alaway*, 64 Wash.App. 796, 828 P.2d 591, 593 (Div. II, 1992). The result is also buttressed by the cigarette tax law of Washington. The Washington law, RCW § 82.24.250(4) only transmutes cigarettes into “deemed contraband” if a carrier does not give notice. In fact, no Indian has to give notice. Cigarettes are not inherent contraband.

L. No cigarette taxation cases result in a crime until a taxable consumer purchases the cigarettes without state tax in the jurisdiction. Possession of unstamped cigarettes is not illegal.

Harder's Express, Inc. v. State Tax Commission, 402 N.Y.S.2d 721 (N.Y. 1978), holds that cigarettes seized en route by theft without tax stamps does not violate state tax law as no sale occurred. Non Indian cases, including *Neeld v. Giroux*, 131 A.2d 508 (N.J. 1957) and *State v. 483 Cases, More or Less, of Assorted Brands of Cigarettes*, 96 A.2d 568 (N.H. 1953), hold that possession is not illegal. The cited cases have statutes like Washington's. They did not impose cigarette taxes on transporters prohibited by the Federal Constitution. *Id.* at 569. The cigarettes were seized before stamps were affixed. They were transported within the state by the owner into the owner's farmhouse. *Pfeiffer v. State*, 295 S.W.2d 365 (Ark. 1956), is also applicable.

The owner was transporting 173 cases of cigarettes and would have sold them anywhere if he made a 3% profit. The court cited “Article 1, Section 8, Clause 3 of the Constitution.” *Id.* at 367. It reversed the conviction stating: “The state has no authority to levy a tax on property while it is being transported in interstate commerce.”

Galesburg Eby-Brown Co. v. Department of Revenue, 497 N.E.2d 874 (Ill. 1986); *Homier Distributing v. City of Albany*, 90 N.Y.2d 153 (Ct.App.N.Y. 1997) and *Paul ex rel. Paul v. State, Dept. of Revenue*, 110 Wn.App. 387, 392-3, 40 P.3d 1203 (Div. I, 2002), all hold that until sale at retail, cigarettes in transport are not subject to cigarette tax. *State of New York v. Mountain Tobacco Company* 2016 WL 3962992 at *16 (U.S.D.C.N.Y. 2016) holds that possession by common carrier without stamps is not a violation of the law as possession without sale is not a violation. Cigarettes are manufactured primarily in the south eastern U.S. and, since state stamping depends on ultimate destination, they are not stamped. The state statutes allow unstamped stock when taken to Indian reservations. RCW § 84.24.040(3) and (5). Military sales are never stamped. Possession alone of unstamped stock is not a crime. The state loses no tax if an Indian retailer sells to a non Indian consumer as the consumer is obligated to send the tax to Olympia.

VI.

CONCLUSION

The State Courts had no territorial jurisdiction to issue a search warrant for state employees to go into Indian country and arrest the Comenouts. *State v. Comenout*, 173 Wash.2d 235, never decided this issue. The Allotment is defined as Indian Country and has the same status as an Indian reservation. Therefore, no state court has subject matter jurisdiction to adjudicate a case accusing an Indian owner or Indian worker for a state victimless crime allegedly committed on the allotment. Even if the court has jurisdiction, the comprehensive changes to the 1995 State Cigarette Tax Law, also amended in 2003, is not mandatory on Indian retailers in Indian country. The cases should be reversed with orders to dismiss them.

DATED this 17th day of January, 2017.


ROBERT E. KOVACEVICH, WSBA# 2723
Attorney for Defendant

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY DEPUTY

This is to certify that a copy of the foregoing Corrected Opening Brief was served on counsel for the Plaintiff by mailing on January 17th, 2017, in a postage paid envelope addressed as follows:

Joshua L. Choate
Assistant Attorney General
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

A copy of the Corrected Opening Brief, pursuant to RAP 10.10 was sent by mail to Defendants at 908 E. River Road, Puyallup, WA. 98371.

DATED this 17th day of January, 2017


ROBERT E. KOVACEVICH, WSBA# 2723
Attorney for Defendant

ATTACHMENT 1

TO HAVE AND TO HOLD, The said premises with all their appurtenances unto the said party of the second part and to his heirs and assigns forever; and the said Fidelity Rent & Collection Company party of the first part for itself and its successors, does hereby covenant to and with the said party of the second part, his heirs and assigns, that it is the owner in fee simple of said premises, and that they are free from all incumbrances and that it will WARRANT and DEFEND the title thereto against all lawful claims whatsoever.

IN WITNESS WHEREOF, The said party of the first part has caused its corporate name and seal to be hereunto subscribed and affixed; and these presents to be executed by its officers thereunto duly authorized, this 26th day of October 1926.

Executed in Presence of

FIDELITY RENT & COLLECTION COMPANY
By J. C. Heitman, Its President.
Attest E. C. Gemberling, Its Secretary.

" FIDELITY RENT AND COLLECTION COMPANY "
" CORPORATE SEAL 1891 "

STATE OF WASHINGTON,)
County of Pierce.)ss.

On this 26th day of October 1926, before me personally appeared J. C. Heitman and E. C. Gemberling, to me known to be the President and Secretary of the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

" M. E. Phelan NOTARY PUBLIC "
" STATE OF WASHINGTON "
" COMMISSION EXPIRES JAN. 9, 1930 "

M. E. Phelan
Notary Public in and for the State of
Washington, residing at Tacoma in said County.

Filed and recorded at request of Wm. G. Nicol Nov 6, 1926 at 8:03 A. M.

F. Campbell, Jr., Auditor Pierce Co. Wn.

By *E. C. Gemberling*

Deputy

-I.K.-

829907

THIS INDENTURE WITNESSETH, That Fidelity Finance Company a corporation organized and existing under the laws of the State of Washington, party of the first part, for and in consideration of the sum of ten and no/100 (\$10.00) Dollars and other valuable considerations Dollars, in lawful money of the United States of America, and to it in hand paid by Clara Nicol, party of the second part, has GRANTED, BARGAINED and SOLD and by these presents does Grant, Bargain, Sell and Convey unto the said party of the second part and to her heirs and assigns, the following described real property, situate, lying and being in the County of Pierce, State of Washington, to-wit:

Beginning 30.00 feet West and 30.00 feet South of the Northeast corner of the Southeast quarter of the Southeast quarter of the Southwest quarter of Section 34, Township 21 North, Range 2 East, W. M., thence continuing South parallel to east line of above described tract 126.00 feet, thence West parallel to North line above described tract 300.00 feet, thence North 126.00 feet, thence West 300.00 feet to beginning and containing 0.67 acres more or less, being Lot 1 in the unrecorded plat of Hollywood Terrace, as surveyed by D. H. White.

TO HAVE AND TO HOLD, The said premises, with all their appurtenances unto the said party of the second part and to her heirs and assigns forever; and the said Fidelity Finance Company party of the first part, for itself and its successors, does hereby covenant to and with the said party of the second part, her heirs and assigns, that it is the owner in fee simple of said premises, and that they are free from all incumbrances, Subject to any taxes and assessments that have become a lien against the herein described property since May 21st, 1926 and that it will WARRANT and DEFEND the title thereto against all lawful claims whatsoever.

IN WITNESS WHEREOF, The said party of the first part has caused its corporate name and seal to be hereunto subscribed and affixed; and these presents to be executed by its officers thereunto duly authorized, this 8th day of July 1926.

Executed in Presence of

FIDELITY FINANCE COMPANY
By J. C. Heitman, Its President.
Attest E. C. Gemberling, Its Secretary

" FIDELITY FINANCE COMPANY TACOMA, WASH. "
" CORPORATE SEAL 1916 "

STATE OF WASHINGTON,)
County of Pierce.)ss.

On this 8th day of July 1926, before me personally appeared J. C. Heitman and E. C. Gemberling, to me known to be the President and Secretary of the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

" M. E. Phelan NOTARY PUBLIC "
" STATE OF WASHINGTON "
" COMMISSION EXPIRES JAN. 9, 1930 "

M. E. Phelan
Notary Public in and for the State of
Washington, residing at Tacoma in said County.

Filed and recorded at request of Wm. G. Nicol Nov 6, 1926 at 8:04 A. M.

F. Campbell, Jr., Auditor Pierce Co. Wn.

By *E. C. Gemberling*

Deputy

-I.K.-

826970

WARRANTY DEED (Statutory Form)

(Office of Indian Affairs)
(RECEIVED)
(Sep 18, 1926)
(45836)

The Grantor, William Attridge, a widower, of Puyallup, Pierce County, Washington, for and in consideration of the sum of thirty seven hundred (\$3,700.00) Dollars, in hand paid, conveys and warrants to Edward Comenout, a noncompetent Quinault Indian, the following described real property situated in the County of Pierce and State of Washington, to-wit:-

Commencing at a point 266.14 known and designated upon a of the B. F. Wright D.L.C. N for record in the office of 356.33 feet to a stake; thence 356.33 feet to the stake; thence easterly along the ne of said plat; thence South a beginning, containing two an over the east twenty (20) fe

Also the following described town:

All that portion of the aban lines, between Government Lot twenty-one (21), Township 21, lying south of the South bar feet of Tract one (1) of the Puyallup, EXCEPTING therefrom bank, containing 36/100 acre

Together with the tenements, plat, and the remainder or row TO HAVE AND TO HOLD the above forever, UPON THE CONDITION I be alienated or encumbered witho IN WITNESS WHEREOF, the said

L. ING.
Signed, Sealed and Delivered in the pr
By J. Avery
Mc Mill.

NOT OF WASHINGTON,)
COUNTY OF PIERCE.)ss.

J. Floy A. Avery, a Notary I
May of September A.D. 1926, perso
described in and who executed the
me as his free and voluntary act as
Given under my hand and off

JOHN A. AVERY NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES DEC. 8, 1927

NOT OF WASHINGTON)
COUNTY OF PIERCE)ss.

I, M. B. Sams, Superintendent
pl for the within described real pr
of the grantor, said real pr
Dated at Hoquiam, Washington

Witness Ind. Affs.

Read Dis.

Entered in Misc. Deed book

W. 22, page 71 October 18, 1926.

And also recorded at request of W. I

By *J. A. Avery*

NOTE
The Grantor, HAVLOCK C. BOY
the of (\$1,000) One Dollar and other
HARLOCK CO, the following describe

Lots Five (5) to Forty-four
designated upon a certain pl
which plat was filed for rec
and recorded in book 2 of pl

Placed in the County of Pierce, Sta

This conveyance is made sub
Dated at Tacoma, Washington,

IN WITNESS WHEREOF, Havlock

attested by its Secretary and son

of Article V, of the By-Laws now in f

corporation is authorized and empower

and other obligations and i

the Board of Trustees, and the Secret

also to all instruments requiring th

HAVLOCK C. BOYLE & CO. TACOMA, WA
CORPORATE SEAL

NOT OF WASHINGTON,)
County of Pierce.)ss.

On this 19th day of October

and, to me known to be the President

that executed the within and foregoing,

Notary act and deed of said corpora

that they were authorized to execute i



826970

STATE OF WASHINGTON, County of Pierce
ss: I, Julie Anderson, of the above
entitled county, do hereby certify that this
forgoing instrument is a true and correct copy
of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of Said County.

By: *Julie Anderson* Deputy
Date: 11/14/88

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON;

Plaintiff-Appellee,

v.

ROBERT R. COMENOUT JR., LEE ALLEN COMENOUT SR.,
MARLENE COMENOUT AND ROBERT R. COMENOUT SR.;

Defendants-Appellants.

APPENDIX

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West's Revised Code of Washington Annotated
Title 2. Courts of Record (Refs & Annos)
Chapter 2.06. Court of Appeals (Refs & Annos)

West's RCWA 2.06.030

2.06.030. General powers and authority--Transfers of cases--Appellate jurisdiction, exceptions--Appeals

Currentness

The administration and procedures of the court shall be as provided by rules of the supreme court. The court shall be vested with all power and authority, not inconsistent with said rules, necessary to carry into complete execution all of its judgments, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the Constitution and laws of this state.

For the prompt and orderly administration of justice, the supreme court may (1) transfer to the appropriate division of the court for decision a case or appeal pending before the supreme court; or (2) transfer to the supreme court for decision a case or appeal pending in a division of the court.

Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all cases except:

- (a) cases of quo warranto, prohibition, injunction or mandamus directed to state officials;
- (b) criminal cases where the death penalty has been decreed;
- (c) cases where the validity of all or any portion of a statute, ordinance, tax, impost, assessment or toll is drawn into question on the grounds of repugnancy to the Constitution of the United States or of the state of Washington, or to a statute or treaty of the United States, and the superior court has held against its validity;
- (d) cases involving fundamental and urgent issues of broad public import requiring prompt and ultimate determination; and
- (e) cases involving substantive issues on which there is a direct conflict among prevailing decisions of panels of the court or between decisions of the supreme court;

all of which shall be appealed directly to the supreme court: PROVIDED, That whenever a majority of the court before which an appeal is pending, but before a hearing thereon, is in doubt as to whether such appeal is within the categories set forth in subsection (d) or (e) of this section, the cause shall be certified to the supreme court for such determination.

The appellate jurisdiction of the court of appeals does not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars.

The court shall have appellate jurisdiction over review of final decisions of administrative agencies certified by the superior court pursuant to RCW 34.05.518.

Appeals from the court to the supreme court shall be only at the discretion of the supreme court upon the filing of a petition for review. No case, appeal or petition for a writ filed in the supreme court or the court shall be dismissed for the reason that it was not filed in the proper court, but it shall be transferred to the proper court.

Credits

[1980 c 76 § 3; 1979 c 102 § 1; 1969 ex.s. c 221 § 3.]

Notes of Decisions (14)

West's RCWA 2.06.030, WA ST 2.06.030

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

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West's Revised Code of Washington Annotated
Title 2. Courts of Record (Refs & Annos)
Chapter 2.08. Superior Courts (Refs & Annos)

West's RCWA 2.08.010

2.08.010. Original jurisdiction

Currentness

The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce and for annulment of marriage, and for such special cases and proceedings as are not otherwise provided for; and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, and shall have the power of naturalization and to issue papers therefor. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition and writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued on legal holidays and nonjudicial days.

Credits

[1955 c 38 § 3; 1890 p 342 § 5; RRS § 15.]

Notes of Decisions (133)

West's RCWA 2.08.010, WA ST 2.08.010

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

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West's Revised Code of Washington Annotated
Title 37. Federal Areas--Indians (Refs & Annos)
Chapter 37.12. Indians and Indian Lands--Jurisdiction (Refs & Annos)

West's RCWA 37.12.010

37.12.010. Assumption of criminal and civil jurisdiction by state

Currentness

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

Credits

[1963 c 36 § 1; 1957 c 240 § 1.]

West's RCWA 37.12.010, WA ST 37.12.010

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

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West's Revised Code of Washington Annotated
Title 37. Federal Areas--Indians (Refs & Annos)
Chapter 37.12. Indians and Indian Lands--Jurisdiction (Refs & Annos)

West's RCWA 37.12.050

37.12.050. State's jurisdiction limited by federal law

Currentness

The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

Credits

[1957 c 240 § 5.]

Notes of Decisions (3)

West's RCWA 37.12.050, WA ST 37.12.050

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West's Revised Code of Washington Annotated
Title 43. State Government--Executive (Refs & Annos)
Chapter 43.06. Governor (Refs & Annos)

West's RCWA 43.06.455

43.06.455. Cigarette tax contracts--Requirements--Use of revenue--Enforcement--Definitions

Currentness

(1) The governor may enter into cigarette tax contracts concerning the sale of cigarettes. All cigarette tax contracts shall meet the requirements for cigarette tax contracts under this section. Except for cigarette tax contracts under RCW 43.06.460, the rates, revenue sharing, and exemption terms of a cigarette tax contract are not effective unless authorized in a bill enacted by the legislature.

(2) Cigarette tax contracts shall be in regard to retail sales in which Indian retailers make delivery and physical transfer of possession of the cigarettes from the seller to the buyer within Indian country, and are not in regard to transactions by non-Indian retailers. In addition, contracts shall provide that retailers shall not sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen years.

(3) A cigarette tax contract with a tribe shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers. The tribe may allow an exemption for sales to tribal members.

(4) Cigarette tax contracts shall provide that all cigarettes possessed or sold by a retailer shall bear a cigarette stamp obtained by wholesalers from a bank or other suitable stamp vendor and applied to the cigarettes. The procedures to be used by the tribe in obtaining tax stamps must include a means to assure that the tribal tax will be paid by the wholesaler obtaining such cigarettes. Tribal stamps must have serial numbers or some other discrete identification so that each stamp can be traced to its source.

(5) Cigarette tax contracts shall provide that retailers shall purchase cigarettes only from:

(a) Wholesalers or manufacturers licensed to do business in the state of Washington;

(b) Out-of-state wholesalers or manufacturers who, although not licensed to do business in the state of Washington, agree to comply with the terms of the cigarette tax contract, are certified to the state as having so agreed, and who do in fact so comply. However, the state may in its sole discretion exercise its administrative and enforcement powers over such wholesalers or manufacturers to the extent permitted by law;

(c) A tribal wholesaler that purchases only from a wholesaler or manufacturer described in (a), (b), or (d) of this subsection; and

- (d) A tribal manufacturer.
- (6) Cigarette tax contracts shall be for renewable periods of no more than eight years. A renewal may not include a renewal of the phase-in period.
- (7) Cigarette tax contracts shall include provisions for compliance, such as transport and notice requirements, inspection procedures, stamping requirements, recordkeeping, and audit requirements.
- (8) Tax revenue retained by a tribe must be used for essential government services. Use of tax revenue for subsidization of cigarette and food retailers is prohibited.
- (9) The cigarette tax contract may include provisions to resolve disputes using a nonjudicial process, such as mediation.
- (10) The governor may delegate the power to negotiate cigarette tax contracts to the department of revenue. The department of revenue shall consult with the *liquor control board during the negotiations.
- (11) Information received by the state or open to state review under the terms of a contract is subject to the provisions of RCW 82.32.330.
- (12) It is the intent of the legislature that the *liquor control board and the department of revenue continue the division of duties and shared authority under chapter 82.24 RCW and therefore the *liquor control board is responsible for enforcement activities that come under the terms of chapter 82.24 RCW.
- (13) Each cigarette tax contract shall include a procedure for notifying the other party that a violation has occurred, a procedure for establishing whether a violation has in fact occurred, an opportunity to correct such violation, and a provision providing for termination of the contract should the violation fail to be resolved through this process, such termination subject to mediation should the terms of the contract so allow. A contract shall provide for termination of the contract if resolution of a dispute does not occur within twenty-four months from the time notification of a violation has occurred. Intervening violations do not extend this time period. In addition, the contract shall include provisions delineating the respective roles and responsibilities of the tribe, the department of revenue, and the *liquor control board.
- (14) For purposes of this section and RCW 43.06.460, 82.08.0316, 82.12.0316, and 82.24.295:
 - (a) "Essential government services" means services such as tribal administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development;
 - (b) "Indian retailer" or "retailer" means (i) a retailer wholly owned and operated by an Indian tribe, (ii) a business wholly owned and operated by a tribal member and licensed by the tribe, or (iii) a business owned and operated by the Indian person or persons in whose name the land is held in trust; and

(c) "Indian tribe" or "tribe" means a federally recognized Indian tribe located within the geographical boundaries of the state of Washington.

Credits

[2001 c 235 § 2.]

Notes of Decisions (2)

West's RCWA 43.06.455, WA ST 43.06.455

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

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West's Revised Code of Washington Annotated Title 82. Excise Taxes (Refs & Annos) Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.010

82.24.010. Definitions

Effective: July 1, 2012

Currentness

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter:

- (1) "Board" means the *liquor control board.
- (2) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state. "Cigarette" includes a roll-your-own cigarette.
- (3) "Cigarette paper" means any paper or any other material except tobacco, prepared for use as a cigarette wrapper.
- (4) "Cigarette tube" means cigarette paper made into a hollow cylinder for use in making cigarettes.
- (5) "Commercial cigarette-making machine" means a machine that is operated in a retail establishment and that is capable of being loaded with loose tobacco, cigarette paper or tubes, and any other components related to the production of roll-your-own cigarettes, including filters.
- (6) "Indian tribal organization" means a federally recognized Indian tribe, or tribal entity, and includes an Indian wholesaler or retailer that is owned by an Indian who is an enrolled tribal member conducting business under tribal license or similar tribal approval within Indian country. For purposes of this chapter "Indian country" is defined in the manner set forth in 18 U.S.C. Sec. 1151.
- (7) "Precollection obligation" means the obligation of a seller otherwise exempt from the tax imposed by this chapter to collect the tax from that seller's buyer.
- (8) "Retailer" means every person, other than a wholesaler, who purchases, sells, offers for sale or distributes any one or more of the articles taxed herein, irrespective of quantity or amount, or the number of sales, and all persons operating under a retailer's registration certificate.

(9) "Retail selling price" means the ordinary, customary or usual price paid by the consumer for each package of cigarettes, less the tax levied by this chapter and less any similar tax levied by this state.

(10) "Roll-your-own cigarettes" means cigarettes produced by a commercial cigarette-making machine.

(11) "Stamp" means the stamp or stamps by use of which the tax levy under this chapter is paid or identification is made of those cigarettes with respect to which no tax is imposed.

(12) "Wholesaler" means every person who purchases, sells, or distributes any one or more of the articles taxed herein to retailers for the purpose of resale only.

(13) The meaning attributed, in chapter 82.04 RCW, to the words "person," "sale," "business" and "successor" applies equally in this chapter.

Credits

[2012 2nd sp.s. c 4 § 1, eff. July 1, 2012; 1997 c 420 § 3; 1995 c 278 § 1; 1961 c 15 § 82.24.010. Prior: 1959 c 270 § 9; 1949 c 228 § 14; 1935 c 180 § 83; Rem. Supp. 1949 § 8370-83.]

Notes of Decisions (6)

West's RCWA 82.24.010, WA ST 82.24.010

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

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West's Revised Code of Washington Annotated Title 82. Excise Taxes (Refs & Annos) Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.030

82.24.030. Stamps

Effective: July 1, 2012
Currentness

(1) In order to enforce collection of the tax hereby levied, the department of revenue must design and have printed stamps of such size and denominations as may be determined by the department. The stamps must be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid or whether an exemption from the tax applies.

(2) Except as otherwise provided in this chapter, only a wholesaler may cause to be affixed on every package of cigarettes, stamps of an amount equaling the tax due thereon or stamps identifying the cigarettes as exempt before he or she sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same. However, where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.

(3) Except as otherwise provided in this chapter, only wholesalers may purchase or obtain cigarette stamps. Wholesalers may not sell or provide stamps to any other wholesaler or person.

(4) Each roll of stamps, or group of sheets, must have a separate serial number, which is legible at the point of sale. The department of revenue must keep records of which wholesaler purchases each roll or group of sheets. If the department of revenue permits wholesalers to purchase partial rolls or sheets, in no case may stamps bearing the same serial number be sold to more than one wholesaler. The remainder of the roll or sheet, if any, must either be retained for later purchases by the same wholesaler or destroyed.

(5) Nothing in this section may be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

(6) In order to enforce collection of the tax in the case of roll-your-own cigarettes, a retailer must affix a stamp or stamps to each box or similar container provided by the retailer to the consumer. The box or similar container must be used by a consumer to transport roll-your-own cigarettes from the retailer's place of business. A retailer must provide cigarette tubes to a consumer in one or more twenty unit denominations. Stamps must be for an amount equaling the tax due under this chapter. Each cigarette tube or paper provided to the consumer is deemed a cigarette for purposes of imposing and collecting taxes under this chapter. Stamps for roll-your-own cigarettes must be issued and affixed in a manner determined by the department but as consistent as practicable with the stamping requirements for wholesalers.

Credits

[2012 2nd sp.s. c 4 § 2, eff. July 1, 2012; 2003 c 114 § 2, eff. July 27, 2003; 1995 c 278 § 2; 1990 c 216 § 1; 1975 1st ex.s. c 278 § 61; 1961 c 15 § 82.24.030. Prior: 1959 c 270 § 3; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Notes of Decisions (3)

West's RCWA 82.24.030, WA ST 82.24.030

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

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West's Revised Code of Washington Annotated Title 82. Excise Taxes (Refs & Annos) Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.040

82.24.040. Duty of wholesaler

Currentness

- (1) Except as authorized by this chapter, no person other than a licensed wholesaler shall possess in this state unstamped cigarettes.
- (2) No wholesaler in this state may possess within this state unstamped cigarettes except that:
- (a) Every wholesaler in the state who is licensed under Washington state law may possess within this state unstamped cigarettes for such period of time after receipt as is reasonably necessary to affix the stamps as required; and
- (b) Any wholesaler in the state who is licensed under Washington state law and who furnishes a surety bond in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of the wholesaler's stock as may be necessary for the conduct of the wholesaler's business in making sales to persons in another state or foreign country or to instrumentalities of the federal government. Such unstamped stock shall be kept separate and apart from stamped stock.
- (3) Every wholesaler licensed under Washington state law shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state or to a federal instrumentality, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the department, at Olympia, not later than the fifteenth day of the following calendar month. For failure to comply with the requirements of this section, the department may revoke the permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed.
- (4) Unstamped cigarettes possessed by a wholesaler under subsection (2) of this section that are transferred by the wholesaler to another facility of the wholesaler within the borders of Washington shall be transferred in compliance with RCW 82.24.250.
- (5) Every wholesaler who is licensed by Washington state law shall sell cigarettes to retailers located in Washington only if the retailer has a current cigarette retailer's license or is an Indian tribal organization authorized to possess untaxed cigarettes under this chapter and the rules adopted by the department.
- (6) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

Credits

[2003 c 114 § 3, eff. July 27, 2003; 1995 c 278 § 3; 1990 c 216 § 2; 1969 ex.s. c 214 § 1; 1961 c 15 § 82.24.040. Prior: 1959 c 270 § 4; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Notes of Decisions (4)

West's RCWA 82.24.040, WA ST 82.24.040

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West's Revised Code of Washington Annotated
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.080

82.24.080. Legislative intent--Taxable event--Tax liability

Effective: June 12, 2008

Currentness

(1) It is the intent and purpose of this chapter to levy a tax on all of the articles taxed under this chapter, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles taxed under this chapter is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this state.

(2) It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by subsection (1) of this section but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. A precollection obligation may not be imposed upon a person exempt from the tax who sells, distributes, or transfers possession of cigarettes to another person who, by law, is exempt from the tax imposed by this chapter or upon whom the obligation for collection of the tax may not be imposed. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

(3) In the event of an increase in the rate of the tax imposed under this chapter, it is the intent of the legislature that the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed articles after the effective date of the rate increase shall be liable for the additional tax, or its precollection obligation as required by this chapter, represented by the rate increase. The failure to pay the additional tax with respect to the first taxable event after the effective date of a rate increase shall not prevent tax liability for the additional tax from arising from a subsequent taxable event.

(4) It is the intent of the legislature that, in the absence of a cigarette tax contract or agreement under chapter 43.06 RCW, applicable taxes imposed by this chapter be collected on cigarettes sold by an Indian tribal organization to any person who is not an enrolled member of the federally recognized Indian tribe within whose jurisdiction the sale takes place consistent with collection of these taxes generally within the state. The legislature finds that applicable collection and enforcement measures under this chapter are reasonably necessary to prevent fraudulent transactions and place a minimal burden on the Indian tribal organization, pursuant to the United States supreme court's decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

Credits

[2008 c 226 § 2, eff. June 12, 2008; 1995 c 278 § 5; 1993 c 492 § 308; 1972 ex.s. c 157 § 4; 1961 c 15 § 82.24.080. Prior: 1959 c 270 § 8; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

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Notes of Decisions (3)

West's RCWA 82.24.080, WA ST 82.24.080

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West's Revised Code of Washington Annotated
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.110

82.24.110. Other offenses--Penalties

Effective: July 1, 2012
Currentness

(l) Each of the following acts is a gross misdemeanor and punishable as such:

- (a) To sell, except as a licensed wholesaler engaged in interstate commerce as to the article being taxed herein, without the stamp first being affixed;
- (b) To sell in Washington as a wholesaler to a retailer who does not possess and is required to possess a current cigarette retailer's license;
- (c) To use or have in possession knowingly or intentionally any forged or counterfeit stamps;
- (d) For any person other than the department of revenue or its duly authorized agent to sell any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;
- (e) For any person other than the department of revenue, its duly authorized agent, or a licensed wholesaler who has lawfully purchased or obtained them to possess any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;
- (f) To violate any of the provisions of this chapter;
- (g) To violate any lawful rule made and published by the department of revenue or the board;
- (h) To use any stamps more than once or any individual stamped box or similar container used to transport roll-your-own cigarettes more than once;
- (i) To refuse to allow the department of revenue or its duly authorized agent, on demand, to make full inspection of any place of business where any of the articles herein taxed are sold or otherwise hinder or prevent such inspection;
- (j) Except as otherwise provided in this chapter, for any retailer to have in possession in any place of business any of the articles herein taxed, unless the same have the proper stamps attached;

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- (k) For any person to make, use, or present or exhibit to the department of revenue or its duly authorized agent, any invoice for any of the articles herein taxed which bears an untrue date or falsely states the nature or quantity of the goods therein invoiced;
- (l) For any wholesaler or retailer or his or her agents or employees to fail to produce on demand of the department of revenue all invoices of all the articles herein taxed or stamps bought by him or her or received in his or her place of business within five years prior to such demand unless he or she can show by satisfactory proof that the nonproduction of the invoices was due to causes beyond his or her control;
- (m) For any person to receive in this state any shipment of any of the articles taxed herein, when the same are not stamped, for the purpose of avoiding payment of tax. It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of the tax imposed herein;
- (n) For any person to possess or transport in this state a quantity of ten thousand cigarettes or less unless the proper stamps required by this chapter have been affixed or unless: (i) Notice of the possession or transportation has been given as required by RCW 82.24.250; (ii) the person transporting the cigarettes has in actual possession invoices or delivery tickets which show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported; and (iii) the cigarettes are consigned to or purchased by any person in this state who is authorized by this chapter to possess unstamped cigarettes in this state;
- (o) For any person to possess or receive in this state a quantity of ten thousand cigarettes or less unless the proper stamps required by this chapter have been affixed or unless the person is authorized by this chapter to possess unstamped cigarettes in this state and is in compliance with the requirements of this chapter;
- (p) To possess, sell, distribute, purchase, receive, ship, or transport within this state any container or package of cigarettes that does not comply with this chapter; and
- (q) For a retailer to provide consumers with access to a commercial cigarette-making machine without providing a box or similar container that has a properly affixed stamp or stamps.
- (2) It is unlawful for any person knowingly or intentionally to possess or to:
- (a) Transport in this state a quantity in excess of ten thousand cigarettes unless the proper stamps required by this chapter are affixed thereto or unless: (i) Proper notice as required by RCW 82.24.250 has been given; (ii) the person transporting the cigarettes actually possesses invoices or delivery tickets showing the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported; and (iii) the cigarettes are consigned to or purchased by a person in this state who is authorized by this chapter to possess unstamped cigarettes in this state; or
- (b) Receive in this state a quantity in excess of ten thousand cigarettes unless the proper stamps required by this chapter are affixed thereto or unless the person is authorized by this chapter to possess unstamped cigarettes in this state and is in compliance with this chapter.

- (3) Violation of subsection (2) of this section is punished as a class C felony under Title 9A RCW.
- (4) All agents, employees, and others who aid, abet, or otherwise participate in any way in the violation of the provisions of this chapter or in any of the offenses described in this chapter are guilty and punishable as principals, to the same extent as any wholesaler or retailer or any other person violating this chapter.
- (5) For purposes of this section, "person authorized by this chapter to possess unstamped cigarettes in this state" has the same meaning as in RCW 82.24.250.

Credits

[2012 2nd sp.s. c 4 § 6, eff. July 1, 2012; 2008 c 226 § 4, eff. June 12, 2008; 2003 c 114 § 5, eff. July 27, 2003; 1999 c 193 § 2; 1997 c 420 § 4; 1995 c 278 § 7; 1990 c 216 § 4; 1987 c 496 § 1; 1975 1st ex.s. c 278 § 63; 1961 c 15 § 82.24.110. Prior: 1941 c 178 § 15; 1935 c 180 § 86; Rem. Supp. 1941 § 8370-86.]

West's RCWA 82.24.110, WA ST 82.24.110

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West's Revised Code of Washington Annotated
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.250

82.24.250. Transportation of unstamped cigarettes--Invoices and delivery tickets required--Stop and inspect

Effective: July 28, 2013
Currentness

- (1) No person other than: (a) A licensed wholesaler in the wholesaler's own vehicle; or (b) a person who has given notice to the board in advance of the commencement of transportation shall transport or cause to be transported in this state cigarettes not having the stamps affixed to the packages or containers.
- (2) When transporting unstamped cigarettes, such persons shall have in their actual possession or cause to have in the actual possession of those persons transporting such cigarettes on their behalf invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported.
- (3) If unstamped cigarettes are consigned to or purchased by any person in this state, such purchaser or consignee must be a person who is authorized by this chapter to possess unstamped cigarettes in this state.
- (4) In the absence of the notice of transportation required by this section or in the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not a person authorized by this chapter to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.
- (5) Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his or her possession adequate invoices or delivery tickets which give the true name and address of such out-of-state seller or consignor and such out-of-state purchaser or consignee.
- (6) In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.
- (7) For purposes of this section, the term "person authorized by this chapter to possess unstamped cigarettes in this state" means:
 - (a) A wholesaler, licensed under Washington state law;

(b) The United States or an agency thereof;

(c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in this section, brings or causes to be brought into the state unstamped cigarettes, if within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department; and

(d) Any purchaser or consignee of unstamped cigarettes, including an Indian tribal organization, who has given notice to the board in advance of receiving unstamped cigarettes and who within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department.

Nothing in this subsection (7) shall be construed as modifying RCW 82.24.050 or 82.24.110.

(8) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

(9) Nothing in this section shall be construed as limiting the right to travel upon all public highways under Article III of the treaty with the Yakamas of 1855.

Credits

[2013 c 23 § 321, eff. July 28, 2013; 2008 c 226 § 5, eff. June 12, 2008; 2003 c 114 § 8, eff. July 27, 2003; 1997 c 420 § 7; 1995 c 278 § 10; 1990 c 216 § 6; 1972 ex.s. c 157 § 6.]

Notes of Decisions (20)

West's RCWA 82.24.250, WA ST 82.24.250

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West's Revised Code of Washington Annotated
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.295

82.24.295. Exceptions--Sales by Indian retailer under cigarette tax contract

Effective: July 1, 2012
Currentness

(1) The taxes imposed by this chapter do not apply to the sale, use, consumption, handling, possession, or distribution of cigarettes by an Indian retailer during the effective period of a cigarette tax contract subject to RCW 43.06.455.

(2) Effective July 1, 2002, wholesalers and retailers subject to the provisions of this chapter are allowed compensation for their services in affixing the stamps required under this chapter a sum computed at the rate of six dollars per one thousand stamps purchased or affixed by them.

(3) In addition to the compensation allowed under subsection (2) of this section, retailers purchasing stamps for roll-your-own cigarettes are allowed additional compensation to offset the cost of the tax under chapter 82.26 RCW. The amount equals five cents per cigarette.

Credits

[2012 2nd sp.s. c 4 § 10, eff. July 1, 2012; 2001 c 235 § 6.]

Notes of Decisions (3)

West's RCWA 82.24.295, WA ST 82.24.295

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West's Revised Code of Washington Annotated
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.500

82.24.500. Business of cigarette purchase, sale, consignment, distribution,
or providing access to cigarette-making machines--License required--Penalty

Effective: July 1, 2012
Currentness

No person may engage in or conduct the business of purchasing, selling, consigning, or distributing cigarettes in this state without a license under this chapter, or providing consumers with access to a commercial cigarette-making machine without a license under this chapter. A violation of this section is a class C felony.

Credits

[2012 2nd sp.s. c 4 § 11, eff. July 1, 2012; 2003 c 114 § 10, eff. July 27, 2003; 1986 c 321 § 4.]

West's RCWA 82.24.500, WA ST 82.24.500

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West's Revised Code of Washington Annotated Title 82. Excise Taxes (Refs & Annos) Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.900

82.24.900. Construction--1961 c 15

Currentness

The provisions of this chapter shall not apply in any case in which the state of Washington is prohibited from taxing under the Constitution of this state or the Constitution or the laws of the United States.

Credits

[1961 c 15 § 82.24.900. Prior: 1935 c 180 § 94; RRS § 8370-94.]

Notes of Decisions (1)

West's RCWA 82.24.900, WA ST 82.24.900

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West's Revised Code of Washington Annotated
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.26. Tax on Tobacco Products (Refs & Annos)

West's RCWA 82.26.190

82.26.190. Distributors and retailers--Valid license required--Violations--Penalties

Effective: July 26, 2009

Currentness

(1)(a) No person may engage in or conduct business as a distributor or retailer in this state after September 30, 2005, without a valid license issued under this chapter. Any person who sells tobacco products to persons other than ultimate consumers or who meets the definition of distributor under *RCW 82.26.010(3)(d) must obtain a distributor's license under this chapter. Any person who sells tobacco products to ultimate consumers must obtain a retailer's license under this chapter.

(b) A violation of this subsection (1) is punishable as a class C felony according to chapter 9A.20 RCW.

(2)(a) No person engaged in or conducting business as a distributor or retailer in this state may:

(i) Refuse to allow the department or the board, on demand, to make a full inspection of any place of business where any of the tobacco products taxed under this chapter are sold, stored, or handled, or otherwise hinder or prevent such inspection;

(ii) Make, use, or present or exhibit to the department or the board any invoice for any of the tobacco products taxed under this chapter that bears an untrue date or falsely states the nature or quantity of the goods invoiced; or

(iii) Fail to produce on demand of the department or the board all invoices of all the tobacco products taxed under this chapter within five years prior to such demand unless the person can show by satisfactory proof that the nonproduction of the invoices was due to causes beyond the person's control.

(b) No person, other than a licensed distributor or retailer, may transport tobacco products for sale in this state for which the taxes imposed under this chapter have not been paid unless:

(i) Notice of the transportation has been given as required under RCW 82.26.140;

(ii) The person transporting the tobacco products actually possesses invoices or delivery tickets showing the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of tobacco products being transported; and

(iii) The tobacco products are consigned to or purchased by a person in this state who is licensed under this chapter.

(c) A violation of this subsection (2) is a gross misdemeanor.

(3) Any person licensed under this chapter as a distributor, and any person licensed under this chapter as a retailer, shall not operate in any other capacity unless the additional appropriate license is first secured. A violation of this subsection (3) is a misdemeanor.

(4) The penalties provided in this section are in addition to any other penalties provided by law for violating the provisions of this chapter or the rules adopted under this chapter.

Credits

[2009 c 154 § 6, eff. July 26, 2009; 2005 c 180 § 16, eff. July 1, 2005.]

West's RCWA 82.26.190, WA ST 82.26.190

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West's Revised Code of Washington Annotated
Title 84. Property Taxes (Refs & Annos)
Chapter 84.04. Definitions

West's RCWA 84.04.080

84.04.080. "Personal property"

Currentness

"Personal property" for the purposes of taxation, shall be held and construed to embrace and include, without especially defining and enumerating it, all goods, chattels, stocks, estates or moneys; all standing timber held or owned separately from the ownership of the land on which it may stand; all fish trap, pound net, reef net, set net and drag seine fishing locations; all leases of real property and leasehold interests therein for a term less than the life of the holder; all improvements upon lands the fee of which is still vested in the United States, or in the state of Washington; all gas and water mains and pipes laid in roads, streets or alleys; and all property of whatsoever kind, name, nature and description, which the law may define or the courts interpret, declare and hold to be personal property for the purpose of taxation and as being subject to the laws and under the jurisdiction of the courts of this state, whether the same be any marine craft, as ships and vessels, or other property holden under the laws and jurisdiction of the courts of this state, be the same at home or abroad: PROVIDED, That mortgages, notes, accounts, certificates of deposit, tax certificates, judgments, state, county, municipal and taxing district bonds and warrants shall not be considered as property for the purpose of this title, and no deduction shall hereafter be made or allowed on account of any indebtedness owed.

Credits

[1961 c 15 § 84.04.080. Prior: 1925 ex.s. c 130 § 5, part; 1907 c 108 §§ 1, 2; 1907 c 48 § 1, part; 1901 ex.s. c 2 § 1, part; 1897 c 71 § 3, part; 1895 c 176 § 1, part; 1893 c 124 § 3, part; 1891 c 140 § 3, part; 1890 p 530 § 3, part; 1886 p 48 § 2, part; Code 1881 § 2830, part; 1871 p 37 § 1, part; 1869 p 176 § 3, part; 1854 p 332 § 4, part; RRS § 11109, part.]

Notes of Decisions (52)

West's RCWA 84.04.080, WA ST 84.04.080

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Washington Administrative Code Title 458. Revenue, Department of Chapter 458-20. Excise Tax Rules (Refs & Annos)
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WAC 458-20-186

458-20-186. Tax on cigarettes.

Currentness

(1) **Introduction.** This rule explains the tax liabilities of persons who sell, use, consume, handle, possess, or distribute cigarettes in Washington. The tax on cigarettes (also called the "cigarette tax") is in addition to all other taxes owed, such as retailing or wholesaling business and occupation tax, retail sales tax, use tax, and litter tax. See WAC 458-20-185 for tax liabilities associated with taxes that apply to tobacco products other than cigarettes.

(2) **Organization of rule.** The information provided in this rule is divided into eight parts:

(a) Part I explains the tax liabilities of persons who sell, use, consume, handle, possess, or distribute cigarettes in this state.

(b) Part II explains wholesale and retail cigarette vendor licensing requirements and responsibilities.

(c) Part III explains stamping requirements, cigarette tax rates, and refunds.

(d) Part IV describes the roll-your-own cigarette provisions.

(e) Part V describes the exemptions from the tax and the procedures that must be followed to qualify for exemption.

(f) Part VI explains the requirements and responsibilities for persons transporting cigarettes in Washington.

(g) Part VII explains the enforcement and administration of the cigarette tax.

(h) Part VIII explains requirements and responsibilities related to making sales or purchases of cigarettes in Indian country.

Part I - Tax on Cigarettes

(101) **In general.** Except as otherwise provided in chapter 82.24 RCW and this rule, the Washington state cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.

(102) **Definitions.** For the purposes of this rule, the following definitions apply:

- (a) "Board" means the liquor control board.
- (b) "Business" includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly, including any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing cigarettes in this state.
- (c) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state. Cigarette includes a roll-your-own cigarette.
- (d) "Cigarette paper" means any paper or any other material except tobacco, prepared for use as a cigarette wrapper.
- (e) "Cigarette tube" means cigarette paper made into a hollow cylinder for use in making cigarettes.
- (f) "Commercial cigarette-making machine" means a machine that is operated in a retail establishment and that is capable of being loaded with loose tobacco, cigarette paper or tubes, and any other components related to the production of roll-your-own cigarettes, including filters.
- (g) "Department" means the department of revenue.
- (h) "Governmental entity" means:
 - (i) The United States;
 - (ii) The state of Washington (state) including, its departments and institutions, as distinct from its corporate agencies or instrumentalities; and
 - (iii) Any municipal corporation or political subdivision of the state of Washington.
- (i) "Indian tribal organization" means a federally recognized Indian tribe, or tribal entity, and includes an Indian wholesaler or retailer that is owned by an Indian who is an enrolled tribal member conducting business under tribal license or similar tribal approval within Indian country. For purposes of this rule, the terms "Indian," "Indian country," and "Indian tribe" have the same meaning as defined in WAC 458-20-192.
- (j) "Manufacture" means the production, assembly, or creation of new cigarettes. For the purposes of this rule, "manufacture" does not necessarily have the same meaning as provided in RCW 82.04.120.

- (k) "Manufacturer" means a person who manufactures and sells cigarettes.
- (l) "Municipal corporation or political subdivision of the state of Washington" means any county, city, town, school district, fire protection district, or other authority identified as a municipal corporation or political subdivision of the state of Washington by statute and that qualifies for the property tax exemption provided by Article VII of the Washington state Constitution.
- (m) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof.
- (n) "Place of business" means any location where business is transacted with, or sales are made to, customers. The term includes, but is not limited to, any vending machine and any vehicle, truck, vessel or the like at which sales are made.
- (o) "Possession" means both:
- (i) Physical possession by the purchaser; and
 - (ii) When cigarettes are being transported to or held for the purchaser or his or her designee by a person other than the purchaser, constructive possession by the purchaser or his or her designee, which constructive possession is deemed to occur at the location of the cigarettes being so transported or held.
- (p) "Retailer" means every person, other than a wholesaler, who purchases, sells, offers for sale or distributes any one or more of the articles taxed herein, irrespective of quantity or amount, or the number of sales, and all persons operating under a retailer's registration certificate.
- (q) "Roll-your-own cigarettes" means cigarettes produced by a commercial cigarette-making machine.
- (r) "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration.
- (s) "Stamp" means any stamp authorized by the state of Washington, including the stamp or stamps by use of which the cigarette tax is paid or identification is made of those cigarettes with respect to which no tax is imposed.
- (t) "United States" means:

(i) The federal government, including the executive, legislative, and judicial branches, its departments, and federal entities exempt from state or local taxation by reason of specific federal statutory exemption.

The mere fact that an entity is a federal entity, such as an instrumentality of the federal government or a federal corporation, does not mean that the entity is immune from tax. The taxability of a federal entity depends on the benefits and immunities conferred upon it by Congress. Thus, to determine the current taxable status of federal entities, the relevant portion of the federal law should be examined.

(ii) "United States" does not include entities associated with, but not a part of the United States, such as the National Guard (an instrumentality of the state of Washington). Nor does it include entities contracting with the United States government to administer its programs.

(u) "Wholesaler" means every person who purchases, sells, or distributes cigarettes to retailers for the purpose of resale only.

(103) **Imposition of tax.** The cigarette tax is imposed on the first person to sell, use, consume, handle, possess, or distribute cigarettes in Washington. Please refer to subsection (302) of this rule for an explanation of the measure and rate of the tax.

(a) **Payment.** Payment of the cigarette tax is made through the purchase of stamps from banks authorized by the department to sell the stamps. Please refer to subsection (301) of this rule for an explanation of stamping requirements.

(b) **Possession of cigarettes in Washington state.**

(i) Every person (A) in possession of unstamped cigarettes in this state, and (B) not specifically exempt by law, is liable for payment of the cigarette tax as provided in chapter 82.24 RCW and this rule.

(ii) Active duty or retired military personnel, and their dependents, may purchase cigarettes for their own consumption on military reservations without paying the state tax (see Part V). However, such persons are not permitted to give or resell those cigarettes to others.

(iii) Possession of unstamped and untaxed cigarettes, and possession of counterfeit cigarettes, are criminal offenses in this state. See Part VII.

Part II - Wholesale and Retail Cigarette Vendor Licensing Requirements and Responsibilities

(201) **License required.** No person, other than a governmental entity or an Indian tribal organization, may engage in the retail or wholesale distribution of cigarettes in this state without a license. Failure to obtain the required license prior to selling cigarettes at wholesale or retail is a criminal act. RCW 82.24.500.

(202) **Cigarette wholesaler license.** Prior to the sale or distribution of cigarettes at wholesale, each wholesaler must first obtain a cigarette wholesaler license from the department through its business licensing service.

(a) **Background check.** Each wholesaler must undergo a criminal background check by the board before a license will be issued. RCW 82.24.510. See chapter 314-33 WAC for board standards. Failure to provide information sufficient to complete the background check may result in denial of the license by the department.

(b) **Application.** Application for a license or renewal of a license is made on forms supplied by the department and must be accompanied by the annual license fee as provided in chapter 82.24 RCW. A cigarette wholesaler license is valid for one year from the date it is issued.

(c) **Multiple locations.** If the wholesaler sells, stores, or intends to sell, cigarettes at more than one place of business, whether temporary or permanent, a separate license with a license fee as provided in chapter 82.24 RCW is required for each additional place of business. Each license must be exhibited in the place of business for which it is issued.

(d) **Bond required.** Each licensed wholesaler must file a bond with the department in an amount determined by the department, but not less than five thousand dollars. The bond must be executed by the wholesaler as principal, and by a corporation approved by the department and authorized to engage in business as a surety company in this state, as surety. The bond must run concurrently with the cigarette wholesaler license.

(203) **Duties and responsibilities of licensed wholesalers.**

(a) **Stamps.** Except as provided in Parts IV and VIII of this rule, only licensed wholesalers may purchase or obtain cigarette stamps. Wholesalers are prohibited by law from selling or providing stamps to any other wholesaler or person.

(b) **Numbering.** Each roll of stamps, or group of sheets, has a separate serial number. The department keeps records of which wholesaler purchases each roll or group of sheets. Wholesalers and retailers of roll-your-own cigarettes are prohibited from possessing stamps other than those specifically issued to them.

(c) **Sales restricted.** Wholesalers selling cigarettes in this state may sell:

(i) Stamped or unstamped cigarettes to other Washington licensed cigarette wholesalers;

(ii) State tax stamped cigarettes only to Washington retailers who have a current cigarette retailer license or to an Indian tribal organization;

(iii) Tribal tax stamped cigarettes to Indian tribal organizations if the Indian tribal organization is subject to a cigarette compact between the state of Washington and the Indian tribe; or

(iv) Tax-exempt stamped cigarettes to an Indian tribal organization if the Indian tribe does not have a cigarette compact and is subject to the cigarette allocation per WAC 458-20-192.

(d) Unstamped cigarettes. Except as provided in Parts IV, V, and VIII of this rule, no person other than a licensed wholesaler may possess unstamped cigarettes in this state. Cigarettes are "unstamped" if they do not have a "stamp" as the term is defined in subsection (102)(s). Licensed wholesalers may possess unstamped cigarettes in this state only in the following circumstances:

(i) Licensed wholesalers may possess unstamped cigarettes for up to seventy-two hours after receipt; however, the cigarettes must be stamped on or before sale or transfer to any other party other than another licensed wholesaler. Licensed wholesalers may possess unstamped cigarettes for more than seventy-two hours after receipt if they receive prior written permission from the department to do so.

(ii) Licensed wholesalers may set aside, without stamping, that portion of their stock reasonably necessary for conducting sales to persons outside this state or to instrumentalities of the federal government, so long as the licensed wholesalers have furnished a surety bond in a sum equal to eighty percent of the amount of tax that would be affixed to the cigarettes that are set aside for the conduct of such business without affixing the stamps. All unstamped stock must be kept separate and apart from stamped stock.

(e) Transfers. Wholesalers in possession of unstamped cigarettes under subsection (204)(d) of this rule that are transferred by the wholesaler to another facility within this state must be transferred in compliance with RCW 82.24.250.

(204) Cigarette retailer license. Prior to the retail sale or distribution of cigarettes, each retailer must first be issued a cigarette retailer license from the department through its business licensing service. A license is required for each location at which cigarettes are sold at retail. Each license must be exhibited at the place of business for which it is issued.

(a) **Background check.** Each retailer must undergo a criminal background check by the board before a license will be issued. RCW 82.24.510. See chapter 314-33 WAC for board standards. Failure to provide information sufficient to complete the background check may result in denial of the license by the department.

(b) **Application.** Applications for a license or renewal of a license are made on forms supplied by the department and must be accompanied by the annual license fee as provided in chapter 82.24 RCW. A retail cigarette license is valid for one year from the date it is issued.

(c) **Multiple locations.** A separate license with a license fee as provided in chapter 82.24 RCW is required for each additional place of business at which the retailer operates. Each license must be exhibited in the place of business for which it is issued.

(d) **Cigarette vending machine license.** Retailers who have received a cigarette retailer license and operate cigarette vending machines must obtain a cigarette vending machine license from the department and are required to pay an additional annual fee as set forth in chapter 82.24 RCW for each vending machine.

(iv) Tax-exempt stamped cigarettes to an Indian tribal organization if the Indian tribe does not have a cigarette compact and is subject to the cigarette allocation per WAC 458-20-192.

(d) Unstamped cigarettes. Except as provided in Parts IV, V, and VIII of this rule, no person other than a licensed wholesaler may possess unstamped cigarettes in this state. Cigarettes are "unstamped" if they do not have a "stamp" as the term is defined in subsection (102)(s). Licensed wholesalers may possess unstamped cigarettes in this state only in the following circumstances:

(i) Licensed wholesalers may possess unstamped cigarettes for up to seventy-two hours after receipt; however, the cigarettes must be stamped on or before sale or transfer to any other party other than another licensed wholesaler. Licensed wholesalers may possess unstamped cigarettes for more than seventy-two hours after receipt if they receive prior written permission from the department to do so.

(ii) Licensed wholesalers may set aside, without stamping, that portion of their stock reasonably necessary for conducting sales to persons outside this state or to instrumentalities of the federal government, so long as the licensed wholesalers have furnished a surety bond in a sum equal to eighty percent of the amount of tax that would be affixed to the cigarettes that are set aside for the conduct of such business without affixing the stamps. All unstamped stock must be kept separate and apart from stamped stock.

(e) Transfers. Wholesalers in possession of unstamped cigarettes under subsection (204)(d) of this rule that are transferred by the wholesaler to another facility within this state must be transferred in compliance with RCW 82.24.250.

(204) Cigarette retailer license. Prior to the retail sale or distribution of cigarettes, each retailer must first be issued a cigarette retailer license from the department through its business licensing service. A license is required for each location at which cigarettes are sold at retail. Each license must be exhibited at the place of business for which it is issued.

(a) **Background check.** Each retailer must undergo a criminal background check by the board before a license will be issued. RCW 82.24.510. See chapter 314-33 WAC for board standards. Failure to provide information sufficient to complete the background check may result in denial of the license by the department.

(b) **Application.** Applications for a license or renewal of a license are made on forms supplied by the department and must be accompanied by the annual license fee as provided in chapter 82.24 RCW. A retail cigarette license is valid for one year from the date it is issued.

(c) **Multiple locations.** A separate license with a license fee as provided in chapter 82.24 RCW is required for each additional place of business at which the retailer operates. Each license must be exhibited in the place of business for which it is issued.

(d) **Cigarette vending machine license.** Retailers who have received a cigarette retailer license and operate cigarette vending machines must obtain a cigarette vending machine license from the department and are required to pay an additional annual fee as set forth in chapter 82.24 RCW for each vending machine.

(e) **Commercial cigarette making machine license.** Retailers who have received a cigarette retailer license and tobacco products retailer license (see WAC 458-20-185) and operate commercial cigarette making machines must obtain a commercial cigarette making machine license from the department and are required to pay an additional annual fee as set forth in chapter 82.24 RCW for each location with a machine. Each license must be exhibited in the place of business for which it is issued.

Persons operating a commercial cigarette making machine are also subject to federal licensing requirements as a cigarette manufacturer. Please contact the Alcohol and Tobacco Tax and Trade Bureau of the United States Department of the Treasury.

(205) Duties and responsibilities of retailers.

(a) No retailer in this state may possess unstamped cigarettes unless he or she is also a licensed wholesaler.

(b) Retailers may obtain cigarettes only from cigarette wholesalers licensed by this state.

(206) Additional requirements for manufacturers, wholesalers, and retailers. Persons making wholesale or retail sales of cigarettes or manufacturing cigarettes must comply with all the provisions of chapters 70.155 and 70.158 RCW.

(207) Licensing enforcement. The board has the licensing enforcement responsibilities for cigarettes. See chapters 314-33 and 314-34 WAC for rules related to the board's enforcement of cigarette licensing.

Part III - Stamping, Rates, and Refunds

(301) Cigarette stamps.

(a) Stamps indicating payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession, or distribution of all cigarettes other than those specifically exempted as explained in Part V of this rule. The stamp must be affixed securely and applied one time (not to be reused) to the smallest container or package (such as a pack of cigarettes rather than a carton of cigarettes), unless the department, in its sole discretion, determines that it is impractical to do so. Stamps must be of the type authorized by the department and affixed in such a manner that they cannot be removed from the package or container without being mutilated or destroyed. Further, the stamps must be affixed in such manner as to permit the department to readily ascertain by inspection whether or not such tax has been paid. RCW 82.24.030(1). To that end, any package that is missing more than fifty percent of the stamp will be considered unstamped and untaxed.

(b) Licensed wholesalers may purchase state-approved cigarette stamps from authorized banks. Payment for stamps must be made at the time of purchase unless the wholesaler has prior approval of the department to defer payment and furnishes a surety bond equal to the proposed monthly credit limit. Payments under a deferred plan are due within thirty days following purchase. Licensed wholesalers are compensated for affixing the stamps at the rate of \$6.00 per thousand stamps affixed (the "stamping allowance").

(302) Rates.

(a) The Washington state cigarette tax is imposed on a per cigarette basis. The rate of the tax is a combination of statutory rates found in chapter 82.24 RCW.

(b) When the rate of tax increases, the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed cigarettes after the rate increase is liable for the additional tax.

(303) Refunds. Any person may request a refund of the face value of the stamps when the tax is not applicable and the stamps are returned to the department.

(a) Forms. The claim for refund must be filed on a form provided by the department. Documentation supporting the claim must be provided at the time the claim for refund is made as specified on the form. The department has the following forms for cigarette tax refund claims:

(i) Cigarette Tax Claim for Refund form. The form is for wholesalers who have returned stamped cigarettes to the manufacturer or are returning damaged or unused stamps to the department. An affidavit or certificate from the manufacturer for stamped cigarettes returned to the manufacturer for destruction or by an agent of the department verifying the voiding of stamps and authorizing the refund must accompany the claim for refund.

(ii) Tribal Member Claim for Refund form. This refund form is for Indian tribal members who purchase state stamped cigarettes as consumers within their own Indian country.

(b) Refunds may be claimed for stamped cigarettes if the stamps are:

(i) Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor; or

(ii) Improperly or partially affixed through burns, jams, double stamps, stamped on carton flaps, or improperly removed from the stamp roll.

Refunds for stamped cigarettes will not include the stamping allowance.

Part IV - Roll-Your-Own Cigarettes

(401) Retailers.

(a) Licenses required. Only retailers licensed to sell cigarettes in Washington may provide consumers with access to a commercial cigarette making machine to make roll-your-own cigarettes. Retailers must also be licensed to sell tobacco products in Washington in order to sell the tobacco to make roll-your-own cigarettes.

(b) Stamped containers. A retailer may not allow consumers to use a commercial cigarette making machine unless the retailer provides the consumer with a box or similar container to transport the roll-your-own cigarettes affixed with cigarette stamps, and the consumer transports the cigarettes from the retailer only in such box or similar container. A retailer must provide cigarette tubes to a consumer in one or more twenty unit denominations. For purposes of this rule, a "similar container" to a box is any package used to transport roll-your-own cigarettes.

(402) **Stamps.** Retailers of roll-your-own cigarettes must purchase and affix roll-your-own cigarette tax stamps for the cigarettes produced through the cigarette making machine. Retailers must contact the department's special programs division to purchase the stamps. Stamps affixed must be for an amount equaling the cigarette tax due. Each cigarette tube or paper provided to the consumer is deemed a cigarette for purposes of imposing and collecting the cigarette tax. Stamps must be of the type authorized by the department and affixed in the manner provided for wholesalers in subsection (301)(a) of this rule. Retailers purchasing stamps for roll-your-own cigarettes are compensated for affixing the stamps with the stamping allowance provided under subsection (301)(b) of this rule, as well as an additional amount of five cents per cigarette to offset the cost of the tobacco products tax under chapter 82.26 RCW and WAC 458-20-185. See RCW 82.24.030(6) for additional rules relating to the affixing of stamps for roll-your-own cigarettes.

Part V - Exemptions

(501) **In general.** There are limited exemptions from the cigarette tax provided by law. This part discusses exemptions and the procedures that must be followed to qualify for an exemption for certain government sales and sales in interstate commerce. For exemptions for sales in Indian country, please see Part VIII of this rule.

(502) **Government sales.** The cigarette tax does not apply to the sale of cigarettes to:

(a) The United States Army, Navy, Air Force, Marine Corps, or Coast Guard exchanges and commissaries and Navy or Coast Guard ships' stores;

(b) The United States Veteran's Administration; or

(c) Any person authorized to purchase from the federal instrumentalities named in (a) or (b) above, if the cigarettes are purchased from the instrumentality for personal consumption.

(503) **Interstate commerce.** The cigarette tax does not apply to cigarettes sold to persons licensed as cigarette wholesalers in other states when, as a condition of the sale, the seller either delivers the cigarettes to the buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to the buyer at a location outside this state.

Part VI - Transporting Cigarettes in Washington

(601) **Transportation of cigarettes restricted.** No person other than a licensed wholesaler may transport unstamped cigarettes in this state except as specifically set forth in RCW 82.24.250 and this rule, or as may be allowed under a cigarette compact under RCW 43.06.450 through 43.06.466. Licensed wholesalers transporting unstamped cigarettes in

this state must do so only in their own vehicles unless they have given prior notice to the board of their intent to transport unstamped cigarettes in a vehicle belonging to another person.

(602) **Notice required.** Persons other than licensed wholesalers using their own vehicles intending to transport unstamped cigarettes in this state must first give notice to the board of their intent to do so, except as provided under RCW 82.24.250(5), or other applicable law.

(603) **Transportation of unstamped cigarettes.** All persons transporting unstamped cigarettes must have in their actual possession invoices or delivery tickets for such cigarettes. The invoices or delivery tickets must show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes transported. It is the duty of the person responsible for the delivery or transport of the cigarettes to ensure that all drivers, agents, or employees have the delivery tickets or invoices in their actual possession for all such shipments.

(604) **Purchase or consignment.** If the unstamped cigarettes transported pursuant to subsection (601), (602), or (603) of this rule are consigned to or purchased by any person in this state, that purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state. As provided in RCW 82.24.250, the following persons are "authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state":

(a) A wholesaler, licensed under Washington state law;

(b) The United States or an agency thereof;

(c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in subsection (602) of this rule, brings or causes to be brought in the state unstamped cigarettes, if within seventy-two hours after receipt of the cigarettes the person has caused stamps to be affixed in accordance with subsection (301) of this rule;

(d) Any purchaser or consignee of unstamped cigarettes, including an Indian tribal organization, who has given notice to the board in advance of receiving unstamped cigarettes and who within seventy-two hours after receipt of the cigarettes has caused the stamps to be affixed in accordance with subsection (301) of this rule.

(605) **Compliance required.** No person may possess or transport cigarettes in this state unless the cigarettes have been properly stamped or that person has fully complied with the requirements of RCW 82.24.250 and this rule. Failure to comply with the requirements of RCW 82.24.250 is a criminal act. Cigarettes in the possession of persons who have failed to comply are deemed contraband and are subject to seizure and forfeiture under RCW 82.24.130.

Part VII - Enforcement and Administration

(701) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of cigarettes must be retained. RCW 82.24.090. These records may be combined with those required in connection with the tobacco products tax (see WAC 458-20-185), if there is a segregation therein of the amounts involved. All records must be preserved for five years from the date of the transaction.

(702) **Reports and returns.** The department may require any person dealing with cigarettes in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, and other data required by the department to maintain control over trade in cigarettes.

(a) Manufacturers and wholesalers selling stamped, unstamped, or untaxed cigarettes must submit a complete record of sales of cigarettes in this state monthly. This report is due no later than the fifteenth day of the calendar month and must include all transactions occurring in the previous month.

(b) Persons making sales of tax-exempt cigarettes to Indian tribes or Indian retailers pursuant to WAC 458-20-192 (9)(a) must transmit a copy of the invoice for each such sale to the special programs division of the department prior to shipment.

(c) Wholesalers selling stamped cigarettes manufactured by nonparticipating manufacturers as defined in WAC 458-20-264 must report all such sales to the special programs division no later than the twenty-fifth day of the calendar month and must include all transactions occurring in the previous month. See WAC 458-20-264, National Uniform Tobacco Settlement, for more details on this report.

(d) A person who sells, transfers, or ships for profit cigarettes (as such term is defined in 15 U.S.C. Sec. 375) in interstate commerce, whereby such cigarettes are shipped into Washington, or who advertises or offers such cigarettes for sale, transfer, or shipment in this state, must file a report as required under 15 U.S.C. Sec. 376. This report is due no later than the 10th day of each calendar month and must include a memorandum or invoice covering all shipments of cigarettes made into Washington during the previous calendar month.

(e) Washington consumers who purchase cigarettes outside Washington state, or from some other source without paying Washington taxes, must pay both the cigarette tax and the use tax directly to the department of revenue within seventy-two hours of first possessing them in this state using a "Tax Declaration for Cigarettes" form, which may be obtained from the department.

(703) **Criminal provisions.** Chapter 82.24 RCW prohibits certain activities with respect to cigarettes. Persons handling cigarettes within this state must refer to these statutes. The prohibited activities include, but are not limited to, the following:

(a) **Transportation, possession, or receiving 10,000 or fewer cigarettes.** Transportation, possession or receiving 10,000 or fewer unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a gross misdemeanor. RCW 82.24.110 (1)(n) and (o).

(b) **Transportation, possession, or receiving more than 10,000 cigarettes.** Transportation, possession, or receiving more than 10,000 unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a felony. RCW 82.24.110(2).

(c) **Forgery or counterfeiting of stamps.** Alteration, fabrication, forgery, and counterfeiting of stamps are felonies. RCW 82.24.100.

(d) **Counterfeit cigarettes.** The manufacture, sale, or possession of counterfeit cigarettes in this state is a felony. RCW 82.24.570.

(704) **Search, seizure, and forfeiture.** Any collection agent of the department, enforcement officer of the board, or law enforcement officer of this state may search for, seize, and subsequently dispose of unstamped cigarette packages and containers, counterfeit cigarettes, conveyances of all kinds (including aircraft, vehicles, and vessels) used for the transportation of unstamped and/or counterfeit cigarettes, and vending machines used for the sale of unstamped and/or counterfeit cigarettes. See RCW 82.24.130, et seq., for provisions relating to search, seizure, and forfeiture of property, possible redemption of property, and for treatment of such property in the absence of redemption.

(705) **Penalties.** RCW 82.24.120 provides a penalty for failure to affix the cigarette stamps or to cause the stamps to be affixed as required, or to pay any tax due under chapter 82.24 RCW. In addition to the tax deemed due, a penalty equal to the greater of \$10.00 per package of unstamped cigarettes or \$250.00 will be assessed. Interest is also assessed on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment. The department may, in its sole discretion, cancel all or part of the penalty for good cause.

Part VIII - Sales in Indian Country

(801) **Definitions.** The definitions of "Indian," "Indian country," and "Indian tribe" in WAC 458-20-192 apply to this rule.

(802) **Cigarette compacts.** The state cigarette tax does not apply to cigarettes taxed by an Indian tribe in accordance with a cigarette compact under RCW 43.06.450 through 43.06.466. Cigarette wholesalers making sales in conformance with such compact will be required to obtain and affix a unique tribal stamp prior to sale. For additional information, wholesalers should contact the Indian tribe in question and the department.

(803) **Sales to Indians in Indian country.** The state cigarette tax does not apply to cigarettes sold in Indian country to tribal members of the particular tribe where the cigarettes are purchased for personal consumption. Sales of cigarettes to nonmembers are subject to the tax. Licensed wholesalers may sell exempt stamped cigarettes to tribal retailers in accordance with the requirements of WAC 458-20-192 and the instructions of the department. For reporting such sales, see subsection (702)(b) of this rule.

(804) **Refunds.** Indians who purchase, in their own Indian country, cigarettes to which state stamps have been affixed may apply for a refund under subsection (303) of this rule.

(805) **Licenses.** Indians and Indian tribes engaged in business in Indian country are not required to obtain a cigarette wholesaler or state-issued retailer license in order to purchase cigarettes from state-licensed wholesalers.

(806) **Preemption.** Application of the state cigarette tax may be preempted by tribal, federal, or state law, depending on the circumstance. For additional information, please consult WAC 458-20-192.

Credits

Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.24.550(2), 82.26.220(2). WSR 15-01-107, S 458-20-186, filed 12/18/14, effective 1/18/15; Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-10-033, S 458-20-186, filed 4/26/10, effective 5/27/10; WSR 07-04-119, S 458-20-186, filed 2/7/07, effective 3/10/07. Statutory Authority: RCW 82.24.235, 82.32.300, and 82.01.060(1). WSR 05-02-035, S 458-20-186, filed 12/30/04, effective 1/30/05. Statutory Authority: RCW 82.32.300. WSR 94-10-062, S 458-20-186, filed 5/3/94, effective 6/3/94; WSR 90-24-036, S 458-20-186, filed 11/30/90, effective 1/1/91; WSR 90-04-039, S 458-20-186, filed 1/31/90, effective 3/3/90; WSR 87-19-007 (Order ET 87-5), S 458-20-186, filed 9/8/87; WSR 83-07-032 (Order ET 83-15), S 458-20-186, filed 3/15/83; Order ET 75-1, S 458-20-186, filed 5/2/75; Order ET 73-2, S 458-20-186, filed 11/9/73; Order ET 71-1, S 458-20-186, filed 7/22/71; Order ET 70-3, S 458-20-186 (Rule 186), filed 5/29/70, effective 7/1/70.

Current with amendments adopted through the 16-20 Washington State Register dated, October 19, 2016.

WAC 458-20-186, WA ADC 458-20-186

End of Document

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Washington Administrative Code

Title 458. Revenue, Department of

Chapter 458-20. Excise Tax Rules (Refs & Annos)

WAC 458-20-190

458-20-190. Sales to and by the United States and certain entities created by the
United States--Doing business on federal reservations--Sales to foreign governments.

Currentness

(1) **Introduction.** Federal law prohibits states from directly imposing taxes on the United States. Persons doing business with the United States, however, are subject to the taxes imposed by the state of Washington, unless specifically exempt. This rule explains the tax reporting responsibilities of persons making sales to the United States and to foreign governments. The rule also explains the tax reporting responsibilities of persons engaging in business activities within federal reservations and cleaning up radioactive waste and other by-products of weapons production for the United States.

(a) **Other rules that may be relevant.**

(i) WAC 458-20-17001 Government contracting--Construction, installations, or improvements to government real property.

(ii) WAC 458-20-171 Building, repairing or improving streets, roads, etc., which are owned by a municipal corporation or political subdivision of the state or by the United States and which are used primarily for foot or vehicular traffic.

(iii) WAC 458-20-178 Use tax and the use of tangible personal property.

(iv) WAC 458-20-186 Tax on cigarettes.

(b) **Examples.** This rule provides examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances.

(2) **"United States" defined.**

(a) For the purposes of this rule, the term "United States" means the federal government, including the executive, legislative, and judicial branches, its departments, and federal entities exempt from state or local taxation by specific federal statutory exemption.

The mere fact that an entity is a federal entity, such as an instrumentality or a federal corporation, does not mean that the entity is immune from tax. The taxability of a federal entity and whether the entity is required to collect and remit retail sales/use tax depends on the benefits and immunities conferred on it by Congress. Thus, to determine the current taxable status of federal entities, the relevant portion of the federal law should be examined.

(b) "United States" does not include entities associated with but not a part of the United States, such as the National Guard (an instrumentality of the state of Washington). Nor does it include entities contracting with the United States government to administer its programs.

(3) Prohibition against taxing the United States. The state of Washington is prohibited from imposing taxes directly on the United States.

(a) This prohibition applies to taxes imposed for the privilege of engaging in business such as business and occupation (B&O) (chapter 82.04 RCW) and public utility (chapter 82.16 RCW) taxes.

It also applies to taxes imposed on a buyer or user of goods or services including, but not limited to, the:

(i) State and local retail sales and car rental taxes (chapters 82.08 and 82.14 RCW);

(ii) State and local use tax (chapters 82.12 and 82.14 RCW);

(iii) Solid waste collection tax (chapter 82.18 RCW); and

(iv) Local government taxes such as the special hotel/motel (chapter 67.28 RCW) and convention and trade center (chapter 67.40 RCW) taxes.

(b) The state is also prohibited from requiring the United States to collect taxes imposed on the buyer (e.g., the retail sales tax) as an agent for the state. However, buyers must pay use tax on retail purchases from the United States, unless specifically exempt by law.

(c) In addition, federal law exempts certain nongovernmental entities from state taxes (for which Congress has given specific federal statutory tax exemptions). These specific federal statutory exemptions may not be absolute and may be limited to specific activities of an entity.

(d) The American Red Cross is an instrumentality of the United States. As a federal corporation providing aid and relief, it is exempt from retail sales, use, and B&O taxes under state law. RCW 82.08.0258, 82.12.0259, and 82.04.380.

The Red Cross provides some victims of natural disasters assistance by check, voucher, and/or direct deposits to the individuals' personal bank accounts. Assistance may also be provided with "client assistance cards" that may

be used by the recipients at locations where bankcards are accepted or at automated teller machines (ATM). The retail sales tax treatment of purchases made using these payment methods is:

(i) Electronic funds transfers and checks. Purchases made by an individual using funds that have been transferred into the individual's bank account or received in the form of a check are subject to retail sales tax in the same manner as any other purchase made by that individual, unless specifically exempt by law.

(ii) Vouchers. A voucher is a certificate issued by the Red Cross to an individual that may be exchanged for a specific good or service. As the goods and services will be paid for directly by the Red Cross, the sales are not subject to retail sales tax. A vendor who accepts a voucher will send it and/or other proof of sale to the Red Cross, which will then send a check to the vendor to pay for the purchase.

(iii) Client assistance cards. Sales to individuals who use client assistance cards issued by the Red Cross, or who pay with cash withdrawn from an ATM using the card, are subject to retail sales tax, unless otherwise exempt from tax. These sales are not direct sales to the federal government or one of its instrumentalities.

(e) The Federal Emergency Management Administration (FEMA) is an agency of the federal government. As a federal corporation providing aid and relief, it is exempt from retail sales, use, and B&O taxes under state law. RCW 82.08.0258, 82.12.0259, and 82.04.380.

FEMA provides some victims of natural disasters assistance by check, voucher, and/or direct deposits to the individuals' personal bank accounts. Assistance may also be provided with emergency debit cards that can be used by the recipients at locations where bankcards are accepted or at ATMs. The retail sales tax treatment of purchases made using these payment methods is:

(i) Electronic funds transfer and checks. Sales are subject to retail sales tax as described in (d)(i) of this subsection.

(ii) Vouchers. Sales are not subject to retail sales tax. As with the Red Cross, the goods and services will be paid for directly by FEMA. See (d)(ii) of this subsection.

(iii) Emergency debit cards. As with the Red Cross, "client assistance cards" purchases made with these cards, or with cash withdrawn from an ATM using these cards, are subject to retail sales tax. See (d)(iii) of this subsection.

(4) Persons doing business with the United States. Persons selling goods or services to the United States are subject to taxes imposed on the seller, such as the B&O and public utility taxes, unless a specific tax exemption applies. Persons receiving income from contracting with the United States government to administer its programs, either in whole or in part, are also subject to tax, unless a specific tax exemption applies.

(a) **Certain invoiced amounts not included in gross income.** Persons who contract with the United States may, for federal accounting purposes, be contractually required to invoice goods or services provided to the United States by third parties. The purpose of the invoices is to match the expenditures with the appropriate category of congressional

funding. Amounts received under such invoices should be excluded from the person's gross income when reporting on the excise tax return if all of the following conditions are met with respect to the goods or services:

- (i) The third party directly invoices the United States;
 - (ii) The United States directly pays the third party; and
 - (iii) The person has no liability, either primarily or secondarily, for making payment to the third party or for remitting payment to the third party.
- (b) **Tax obligation with respect to the use of tangible personal property.** Persons performing services for the United States are also subject to the retail sales or use tax on property they use or consume when performing services for the United States, unless specifically exempt.

(i) **Manufacturing articles for commercial or industrial use.** In the case of products manufactured or produced by the person using the products as a consumer, the measure of the use tax is generally the value of the products as explained in WAC 458-20-112. If the articles manufactured or produced by the user are used in the manufacture or production of products sold or to be sold to the department of defense of the United States, the value of articles used is the value of the ingredients of such articles. The manufacturing B&O tax also applies to the value of articles manufactured for commercial or industrial use.

(ii) **Use of government provided property.** When articles or goods used are acquired by bailment, the measure of the use tax to the bailee is the reasonable rental with the value to be determined as nearly as possible according to the rental price at the place of use of similar products of like quality and character. For more information on leases or rentals of tangible personal property see WAC 458-20-211. Thus, if a person has a contract to provide services for the United States and uses government supplied tangible personal property to perform the services, the person must pay use tax on the fair market rental value of the government supplied tangible personal property.

Persons who incorporate government provided articles into construction projects or improvements made to real property of or for the United States should refer to WAC 458-20-17001 for more specific tax-reporting information.

(c) **Exemption for certain machinery and equipment.** Manufacturers or processors for hire may be eligible for the retail sales or use tax exemption provided by RCW 82.08.02565 and 82.12.02565 on machinery and equipment used directly in a manufacturing or research and development operation. For information on the sales and use tax exemptions see WAC 458-20-13601.

(5) **Documenting exempt sales to the United States.** Only sales made directly to the United States are exempt from retail sales tax or other tax imposed on the buyer. To be entitled to the exemption, the purchase must be paid for using a qualified U.S. government credit card, a check from the United States payable to the seller, a United States voucher, or by electronic funds transfer made by the United States.

Sales to employees or representatives of the United States are subject to tax, even though the United States may reimburse the employee or representative for all or a part of the expense. Purchases by any other person, whether with federal funds or through a reimbursement arrangement, are subject to tax unless specifically exempt by law.

(a) **Documenting tax-exempt sales.** Sellers must document the tax-exempt nature of sales made to the United States by keeping a copy of the United States credit card receipt, a copy of the check from the United States, a copy of the federal government voucher, or a copy of documentation clearly indicating payment was made by the United States through electronic funds transfer. For information on how to determine whether purchases made with a U.S. government credit card are exempt from retail sales tax, refer to the department's web site at dor.wa.gov.

(b) **Payment made by government contracted credit card.** Various United States government contracted credit cards are used to make payment for purchases of goods and services by or for the United States government. Sole responsibility for payment of these purchases may rest with the United States government or with the employee. The United States government's system of issuing government contracted credit cards is subject to change. For specific information about determining when payment is the direct responsibility of the United States government or the employee, contact the department's taxpayer services division at:

Taxpayer Services

Department of Revenue

P.O. Box 47478

Olympia, WA 98504-7478

or call the department's telephone information center at 1-800-647-7706 or visit the department's web site at dor.wa.gov.

(6) **Doing business on federal reservations.** The state of Washington has jurisdiction and authority to levy and collect taxes from persons residing within, or with respect to business transactions conducted on, federal reservations. 4 U.S.C. §§ 105-110. The term "federal reservation," as used in this rule, means any land or premises within the exterior boundaries of the state of Washington that are held or acquired by and for the use of the United States, its departments, institutions or entities. This means that a concessionaire operating within a federal reservation under a grant or permit issued by the United States or by a department or entity of the United States is taxable to the same extent as any private operator engaging in a similar business outside a federal reservation and without specific authority from the United States.

(a) **Sales tax collection requirements.** Persons making retail sales to members of the armed forces or others residing within or conducting business on federal reservations are required to collect and remit retail sales tax from the buyer.

(b) **Cigarette tax stamps.** Washington cigarette tax stamps must generally be affixed to all cigarettes sold to persons residing within or conducting business on federal reservations. However, such stamps need not be affixed to

cigarettes sold to the United States or any of its entities including voluntary organizations of military personnel authorized by the Secretary of Defense or the Secretary of the Navy or by the United States or any of its entities to authorized purchasers, for use on such reservation. For additional information on cigarette stamps, rates, and refunds see WAC 458-20-186.

(7) **Sales made to authorized purchasers of the United States.** As explained in subsection (3)(b) of this rule, while sales by the United States are exempt of retail sales tax the purchaser is generally responsible for remitting use tax directly to the department. Federal law prohibits the imposition of use tax on tangible personal property sold to authorized purchasers by the United States, its entities, or voluntary unincorporated organization of armed forces personnel. 4 U.S.C. § 107(a).

(a) **Who is an “authorized purchaser”?** A person is an “authorized purchaser” only with respect to purchases he or she is permitted to make from commissaries, ships' stores, or voluntary unincorporated organizations of personnel of any branch of the armed forces of the United States, under regulations promulgated by the departmental secretary having jurisdiction over such branch. 4 U.S.C. § 107(b).

(b) **What is a “voluntary unincorporated organization”?** “Voluntary unincorporated organizations” are those organizations comprised of armed forces personnel operated under regulations promulgated by the departmental secretary having jurisdiction over such branch. Examples of voluntary unincorporated organizations are post flying clubs, officers or noncommissioned officers open messes, and recreation associations.

(8) **Purchases by persons using federal funds.** Retail sales or use tax applies to retail purchases made by any buyer, other than the United States, including the state of Washington and all of its political subdivisions, irrespective of whether or not the buyer uses or is reimbursed with federal funds, unless the purchase is specifically exempt by law.

(9) **Cleaning up radioactive waste and other by-products of weapons production and nuclear research and development.** RCW 82.04.263 provides a preferential tax rate for the gross income derived from cleaning up for the United States, or its instrumentalities, radioactive waste and other by-products of weapons production and nuclear research and development. This tax rate applies whether the person performing these activities is a general contractor or subcontractor.

(a) **What activities are entitled to the preferential tax rate?** Only those activities that meet the definition of “cleaning up radioactive waste and other by-products of weapons production and nuclear research and development” are entitled to the preferential tax rate. The statute defines “cleaning up radioactive waste and other by-products of weapons production and nuclear research and development” to mean:

(i) The handling, storing, treating, immobilizing, stabilizing, or disposing of radioactive waste, radioactive tank waste and capsules, nonradioactive hazardous solid and liquid wastes, or spent nuclear fuel;

(ii) Conditioning of spent nuclear fuel;

(iii) Removing contamination in soils and groundwater;

(iv) Decontaminating and decommissioning of facilities; and

(v) Services supporting the performance of cleanup. A service supports the performance of cleanup if it:

(A) Is within the scope of work under a clean-up contract with the United States Department of Energy; or

(B) Assists in the accomplishment of a requirement of a clean-up project undertaken by the United States Department of Energy under a subcontract entered into with the prime contractor or another subcontractor in furtherance of a clean-up contract between the United States Department of Energy and a prime contractor.

(b) When does a service not assist in the accomplishment of a requirement of a clean-up project? Subject to specific exceptions provided by law, a service does not assist in the accomplishment of a clean-up project when the same services are routinely provided to businesses not engaged in clean-up activities.

The following exceptions are always deemed to contribute to the accomplishment of a requirement of a clean-up project undertaken by the United States Department of Energy:

- Information technology and computer support services;
- Services rendered in respect to infrastructure; and
- Security, safety, and health services.

(c) Guideline examples. The following examples are to be used as a guideline when determining whether a service is "routinely provided to businesses not engaged in clean-up activities."

(i) Accounting services. The classification does not apply to general accounting services but does apply to performance audits performed for persons cleaning up radioactive waste.

(ii) Legal services. The classification does not apply to general legal services but does apply to those legal services that assist in the accomplishment of a requirement of a clean-up project undertaken by the United States Department of Energy. Thus, legal services provided to contest any local, state, or federal tax liability or to defend a company against worker's compensation claim arising from a worksite injury do not qualify for the classification. However, legal services related to the resolution of contractual dispute between the parties to a clean-up contract between the United States Department of Energy and a prime contractor do qualify.

(iii) General office janitorial. General office janitorial services do not qualify for the radioactive waste clean-up classification, but the specialized cleaning of equipment exposed to radioactive waste does qualify.

(d) Clean-up examples.

(i) Company C is a land excavation contractor that contracts with Prime Contractor to dig trenches where waste will be reburied after processing. Company C's contract for digging trenches qualifies for the preferential tax rate under RCW 82.04.263 because the activity of digging trenches is one of the physical acts of cleaning up.

(ii) Company D contracts with Company C from the previous example to provide payroll and accounting services. Company D's activity does not qualify for the preferential tax rate under RCW 82.04.263 because the activity of general accounting is not an activity involving the physical act of cleaning up, nor is it a service supporting the performance of cleanup as defined in (a)(v) of this subsection.

(iii) Company E is an environmental engineering company that contracts with Prime Contractor to develop a plan on how best to decontaminate the soil at a tank farm and will monitor the cleanup/decontamination as it progresses. Company E's activities qualify for the preferential tax rate under RCW 82.04.263 because the activities are services supporting the performance of cleanup.

(iv) Company F is a security company that contracts with Prime Contractor to provide overall security to the federal reservation, including providing security at clean-up sites. Security services at clean-up sites are services that support the performance of cleanup.

(e) Taxability of tangible personal property used or consumed in cleaning up radioactive waste and other by-products of weapons production and nuclear research and development. Persons cleaning up radioactive waste and other by-products of weapons production and nuclear research and development for the United States, or its instrumentalities, are consumers of any property they use or consume when performing these services. RCW 82.04.190. Therefore, tangible personal property used or consumed in the cleanup is subject to retail sales or use tax. If the seller does not collect retail sales tax on a retail sale, the buyer is required to pay the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department, unless specifically exempt by law. The "excise tax return" does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. For detailed information on the use tax, see WAC 458-20-178.

(10) Sales to foreign governments or foreign diplomats. Purchases by foreign governments are not subject to retail sales tax. Documentation, such as purchase orders and receipts, must be maintained by the seller to verify the exempt nature of the sale. Purchases by foreign diplomats are generally not subject to retail sales tax if a valid Diplomatic Tax Exemption Card issued by the United States Department of State is used. For specific information concerning the taxability of sales of goods and services to foreign missions and diplomats, contact the department's taxpayer services division at:

Taxpayer Services

Department of Revenue

P.O. Box 47478

Olympia, WA 98504-7478

or call the department's telephone information center at 1-800-647-7706 or visit the department's web site at dor.wa.gov.

Credits

Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 16-16-003, S 458-20-190, filed 7/20/16, effective 8/20/16; WSR 10-10-030, S 458-20-190, filed 4/26/10, effective 5/27/10. Statutory Authority: RCW 82.32.300, 82.01.060(1), and 34.05.230. WSR 05-03-002, S 458-20-190, filed 1/5/05, effective 2/5/05. Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), S 458-20-190, filed 3/15/83; Order ET 75-1, S 458-20-190, filed 5/2/75; Order ET 70-3, S 458-20-190 (Rule 190), filed 5/29/70, effective 7/1/70.

Current with amendments adopted through the 16-20 Washington State Register dated, October 19, 2016.

WAC 458-20-190, WA ADC 458-20-190

End of Document

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Washington Administrative Code Title 458. Revenue, Department of Chapter 458-20. Excise Tax Rules (Refs & Annos)
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WAC 458-20-192

458-20-192. Indians-Indian country.

Currentness

(1) Introduction.

(a) Under federal law the state may not tax Indians or Indian tribes in Indian country. In some instances the state's authority to impose tax on a nonmember doing business in Indian country with an Indian or an Indian tribe is also preempted by federal law. This rule only addresses those taxes administered by the department of revenue (department).

(b) The rules of construction used in analyzing the application of tax laws to Indians and nonmembers doing business with Indians are:

(i) Treaties are to be construed in the sense in which they would naturally have been understood by the Indians; and

(ii) Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

(c) This rule reflects the harmonizing of federal law, Washington state tax law, and the policies and objectives of the Centennial Accord and the Millennium Agreement. It is consistent with the mission of the department of revenue, which is to achieve equity and fairness in the application of the law.

(d) It is the department's policy and practice to work with individual tribes on a government-to-government basis to discuss and resolve areas of mutual concern.

(2) Definitions. The following definitions apply throughout this rule:

(a) 'Indian' means a person on the tribal rolls of an Indian tribe. A person on the tribal rolls is also known as an 'enrolled member' or a 'member' or an 'enrolled person' or an 'enrollee' or a 'tribal member.'

(b) 'Indian country' has the same meaning as given in 18 U.S.C. 1151 and means:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation;

(ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.

(c) 'Indian tribe' means an Indian nation, tribe, band, community, or other entity recognized as an 'Indian tribe' by the United States Department of the Interior. The phrase 'federally recognized Indian tribe' and the term 'tribe' have the same meaning as 'Indian tribe.'

(d) 'Indian reservation' means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the use and occupancy of Indian tribes by treaty, law, or executive order and that are areas currently recognized as 'Indian reservations' by the United States Department of the Interior. The term includes lands within the exterior boundaries of the reservation owned by non-Indians as well as land owned by Indians and Indian tribes and it includes any land that has been designated 'reservation' by federal act.

(e) 'Nonmember' means a person not on the tribal rolls of the Indian tribe.

(f) 'State sales and use tax' includes local sales and use tax.

(3) **Federally recognized Indian tribes.** As of the effective date of this rule there are twenty-eight federally recognized Indian tribes in the state of Washington. You may contact the governor's office of Indian affairs for an up-to-date list of federally recognized Indian tribes in the state of Washington at its web site, www.goia.wa.gov or at:

Governor's Office of Indian Affairs

531 15th Ave. S.E.

P.O. Box 40909

Olympia, WA 98504-0909

360-753-2411

(4) **Recordkeeping.** Taxpayers are required to maintain appropriate records on the tax exempt status of transactions. For example, in the case of the refuse collection tax, the refuse collection company must substantiate the tax-exempt status of its customers. This could be done, for example, one of two ways. The tribe can provide the refuse collection company with a list of all of the tribal members living in Indian country or the individual members can provide exemption

certificates to the company. A buyer's retail sales tax exemption certificate that can be used for this purpose is located on the department's web site (www.dor.wa.gov/forms/other.htm) or may be obtained by contacting the department. The company must then keep the list or the certificates in its files as proof of the tax exempt status of the tribe and its members. Individual businesses may contact the department to determine how best to keep records for specific situations.

(5) **Enrolled Indians in Indian country. Generally.** The state may not tax Indians or Indian tribes in Indian country. For the purposes of this rule, the term 'Indian' includes only those persons who are enrolled with the tribe upon whose territory the activity takes place and does not include Indians who are members of other tribes. An enrolled member's spouse is considered an 'Indian' for purposes of this rule if this treatment does not conflict with tribal law. This exclusion from tax includes all taxes (e.g., B&O tax, public utility tax, retail sales tax, use tax, cigarette tax). If the incidence of the tax falls on an Indian or a tribe, the tax is not imposed if the activity takes place in Indian country or the activity is treaty fishing rights related activity (see subsection (6)(b) of this rule). 'Incidence' means upon whom the tax falls. For example, the incidence of the retail sales tax is on the buyer.

(a) (i) **Retail sales tax - tangible personal property - delivery threshold.** Retail sales tax is not imposed on sales to Indians if the tangible personal property is delivered to the member or tribe in Indian country or if the sale takes place in Indian country. For example, if the sale to the member takes place at a store located on a reservation, the transaction is automatically exempt from sales tax and there is no reason to establish 'delivery.'

(ii) **Retail sales tax - services.** The retail sales tax is not imposed if the retail service (e.g., construction services) is performed for the member or tribe in Indian country. In the case of a retail service that is performed both on and off Indian country, only the portion of the contract that relates to work done in Indian country is excluded from tax. The work done for a tribe or Indian outside of Indian country, for example road work that extends outside of Indian country, is subject to retail sales tax.

(b) **Use tax.** Use tax is not imposed when tangible personal property is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(c) **Tax collection.** Generally, sales to persons other than Indians are subject to the retail sales tax irrespective of where in this state delivery or rendition of services takes place. Sellers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them to nonmembers in Indian country. A tribe and the department may enter into an agreement covering the collection of state tax by tribal members or the tribe. (See also the discussion regarding preemption of tax in subsection (7) of this rule.)

In order to substantiate the tax-exempt status of a retail sale to a person who is a tribal member, unless the purchaser is personally known to the seller as a member, the seller must require presentation of a tribal membership card or other suitable identification of the purchaser as an enrollee of the Indian tribe. A tribe and the department may enter into an agreement covering identification of enrolled members, in which case the terms of the agreement govern.

A person's tax status under the Revenue Act does not change simply because he or she is making a tax-exempt sale to a tribe or tribal member. For example, a person building a home for a nonmember/consumer is entitled to purchase subcontractor services and materials to be incorporated into the home at wholesale. See RCW 82.04.050. A person building a home for a tribal member/consumer in Indian country is similarly entitled to purchase these services and materials at wholesale. The fact that the constructing of the home for the tribal member/consumer is exempt from retail

sales tax has no impact on the taxability of the purchases of materials, and the materials continue to be purchased for resale.

(d) **Corporations or other entities owned by Indians.** A state chartered corporation comprised solely of Indians is not subject to tax on business conducted in Indian country if all of the owners of the corporation are enrolled members of the tribe except as otherwise provided in this section. The corporation is subject to tax on business conducted outside of Indian country, subject to the exception for treaty fishery activity as explained later in this rule. Similarly, partnerships or other entities comprised solely of enrolled members of a tribe are not subject to tax on business conducted in Indian country. In the event that the composition includes a family member who is not a member of the tribe, for instance a business comprised of a mother who is a member of the Chehalis Tribe and her son who is a member of the Squaxin Island Tribe, together doing business on the Chehalis reservation, the business will be considered as satisfying the 'comprised solely' criteria if at least half of the owners are enrolled members of the tribe.

(6) Indians outside Indian country.

(a) **Generally.** Except for treaty fishery activity, Indians conducting business outside of Indian country are generally subject to tax (e.g., the B&O, the public utility tax, retail sales tax). Indians or Indian tribes who conduct business outside Indian country must register with the department as required by RCW 82.32.030. (See also WAC 458-20-101 for more registration information.)

(b) **Treaty fishery - preemption.** For the purpose of this rule, 'treaty fishery' means the fishing and shellfish rights preserved in a tribe's treaty, a federal executive order, or an act of Congress. It includes activities such as harvesting, processing, transporting, or selling, as well as activities such as management and enforcement.

(i) **Indians - B&O tax.** The gross income directly derived from treaty fishing rights related activity is not subject to state tax. This exclusion from tax is limited to those businesses wholly owned and operated by Indians/tribe who have treaty fishing rights. If a business wholly owned and operated by Indians/tribe deals with both treaty and nontreaty fish, this exclusion from tax is limited to the business attributable to the treaty fish. 'Wholly owned and operated' includes entities that meet the qualifications under 26 U.S.C. 7873, which requires that:

(A) Such entity is engaged in a fishing rights-related activity of such tribe;

(B) All of the equity interests in the entity are owned by qualified Indian tribes, members of such tribes, or their spouses;

(C) Except as provided in the code of federal regulations, in the case of an entity which engages to any extent in any substantial processing or transporting of fish, ninety percent or more of the annual gross receipts of the entity is derived from fishing rights-related activities of one or more qualified Indian tribes each of which owns at least ten percent of the equity interests in the entity; and

(D) Substantially all of the management functions of the entity are performed by members of qualified Indian tribes.

(ii) **Indians - sales and use tax.** The retail sales tax and use tax do not apply to the services or tangible personal property for use in the treaty fishery, regardless of where delivery of the item or performance of the service occurs. Gear, such as boats, motors, nets, and clothing, purchased or used by Indians in the treaty fishery is not subject to sales or use tax. Likewise, retail services in respect to property used in the treaty fishery, such as boat or engine repair, are not subject to sales tax.

(iii) **Sales to nonmembers.** Treaty fish and shellfish sold by members of the tribe are not subject to sales tax or use tax, regardless of where the sale takes place due to the sales and use tax exemption for food products.

(iv) **Government-to-government agreement.** A tribe and the department may enter into an agreement covering the treaty fishery and taxable activities of enrolled members, in which case the terms of the agreement govern.

(7) **Nonmembers in Indian country - preemption of state tax.** Generally, a nonenrolled person doing business in Indian country is subject to tax. Unless specifically described as preempted by this rule, the department will review transactions on a case-by-case basis to determine whether tax applies. A nonmember who is not taxable on the basis of preemption should refer to WAC 458-20-101 (tax registration) to determine whether the person must register with the department.

(a) **Preemption of tax on nonmembers - gaming.** Gaming by Indian tribes is regulated by the federal Indian Gaming Regulatory Act. Nonmembers who operate or manage gaming operations for Indian tribes are not subject to tax for business conducted in Indian country. This exclusion from tax applies to taxes imposed on income attributable to the business activity (e.g., the B&O tax), and to sales and use tax on the property used in Indian country to conduct the activity. Sales tax will apply if delivery of property is taken outside of Indian country.

Nonmembers who purchase tangible personal property at a gaming facility are subject to retail sales or use tax, unless:

(i) The item is preempted based on the outcome of the balancing test. For example, depending on the relative state, tribal, and federal interests, tax on food at restaurants or lounges owned and operated by the tribe or a tribal member or sales of member arts and crafts at gift shops might be preempted. See the balancing test discussion in subsection (c) below; or

(ii) The item is purchased for use in the gaming activity at the facility, such as bingo cards or daubers.

(b) **Preemption of B&O and public utility tax - sales of tangible personal property or provision of services by nonmembers in Indian country.** As explained in this subsection, income from sales in Indian country of tangible personal property to, and from the performance of services in Indian country for, tribes and tribal members is not subject to B&O (chapter 82.04 RCW) or public utility tax (chapters 82.16 and 54.28 RCW). The taxpayer is responsible for maintaining suitable records so that the taxpayer and the department can distinguish between taxable and nontaxable activities.

(i) **Sales of tangible personal property.** Income from sales of tangible personal property to the tribe or to tribal members is not subject to B&O tax if the tangible personal property is delivered to the buyer in Indian country and if:

(A) The property is located in Indian country at the time of sale; or

(B) The seller has a branch office, outlet, or place of business in Indian country that is used to receive the order or distribute the property; or

(C) The sale of the property is solicited by the seller while the seller is in Indian country.

(ii) **Provision of services.** Income from the performance of services in Indian country for the tribe or for tribal members is not subject to the B&O or public utility tax. Services performed outside of Indian country are subject to tax. In those instances where services are performed both on and off of Indian country, the activity is subject to state tax to the extent that services are substantially performed outside of Indian country.

(A) It will be presumed that a professional service (e.g., accounting, legal, or dental) is substantially performed outside of Indian country if twenty-five percent or more of the time taken to perform the service occurs outside of Indian country. The portion of income subject to state tax is determined by multiplying the gross receipts from the activity by the quotient of time spent outside of Indian country performing the service divided by total time spent performing the service.

For example, an accountant with an office outside of Indian country provides accounting services to a tribal member. The accountant performs some of the work at the office and some work at the business of the tribal member in Indian country. If at least twenty-five percent of the time performing the work is spent outside of Indian country, the services are substantially performed outside of Indian country and therefore a portion is subject to state tax. As explained above, the accountant must maintain suitable records to distinguish between taxable and nontaxable income in order to provide for a reasonable approximation of the amount of gross income subject to B&O tax. In this case, suitable records could be a log of the time and location of the services performed for the tribal matter by the accountant, his or her employees, and any contractors hired by the accountant.

(B) For services subject to the retailing and/or wholesaling B&O tax (e.g., building, installing, improving, or repairing structures or tangible personal property), the portion of income relative to services actually performed outside of Indian country is subject to state tax.

For example, a contractor enters into a contract with a tribe to install a sewer line that extends off reservation. Only the income attributable to the installation of the portion of the sewer line off reservation is subject to state tax.

(C) For public utility services under chapters 82.16 and 54.28 RCW it will be presumed that the service is provided where the customer receives the service.

(c) **Preemption of tax on nonmembers - balancing test - value generated on the reservation.** In certain instances state sales and use tax may be preempted on nonmembers who purchase goods or services from a tribe or tribal members in Indian country. The U.S. supreme court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: The degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax. See *Salt River Pima-Maricopa Indian Community v.*

Waddell, 50 F.3d 734, (1995). This analysis is known as the 'balancing test.' This preemption analysis does not extend to subsequent transactions, for example if the purchaser buys for resale the tax imposed on the consumer in the subsequent sale is not preempted. However, because these balancing test determinations are so fact-based, the department will rule on these issues on a case-by-case basis. For such a ruling please contact the department at:

Department of Revenue

Executive

P.O. Box 47454

Olympia, WA 98504-7454

(d) **Federal contractors.** The preemption analysis does not extend to persons who are doing work for the federal government in Indian country. For example, a nonmember doing road construction for the Bureau of Indian Affairs within an Indian reservation is subject to state tax jurisdiction.

(e) **Indian housing authorities.** RCW 35.82.210 provides that the property of housing authorities and the housing authorities themselves are exempt from taxes, such as state and local sales and use taxes, state and local excise taxes, state and local property taxes, and special assessments. This covers tribal housing authorities and intertribal housing authorities both on and off of Indian land. Please note that tribal housing authorities, like all other housing authorities, are exempt from tax anywhere in the state, and the delivery requirement and other geographic thresholds are not applicable.

Not all assessments are exempted under RCW 35.82.210. See *Housing Authority of Sunnyside v. Sunnyside Valley Irrigation District*, 112 Wn2d 262 (1989).

For the purposes of the exemption:

(i) 'Intertribal housing authority' means a housing authority created by a consortium of tribal governments to operate and administer housing programs for persons of low income or senior citizens for and on behalf of such tribes.

(ii) 'Tribal government' means the governing body of a federally recognized Indian tribe.

(iii) 'Tribal housing authority' means the tribal government or an agency or branch of the tribal government that operates and administers housing programs for persons of low income or senior citizens.

(8) **Motor vehicles, trailers, snowmobiles, etc., sold to Indians or Indian tribes.** Sales tax is not imposed when a motor vehicle, trailer, snowmobile, off-road vehicle, or other such property is delivered to an Indian or the tribe in Indian country or if the sale is made in Indian country. Similarly, use tax is not imposed when such an item is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(a) **Registration of vehicle, trailer, etc.** County auditors, subagencies appointed under RCW 46.01.140, and department of licensing vehicle licensing offices must collect use tax when Indians or Indian tribes apply for an original title transaction or transfer of title issued on a vehicle or vessel under chapters 46.09, 46.10, 46.12, or 88.02 RCW unless the tribe/Indian shows that they are not subject to tax. To substantiate that they are not subject to tax the Indian/tribe must show that they previously paid retail sales or use tax on their acquisition or use of the property, or that the property was acquired on or delivered to Indian country. The person claiming the exclusion from tax must sign a declaration of delivery to or acquisition in Indian country. A statement in substantially the following form will be sufficient to establish eligibility for the exclusion from sales and use tax.

(b) **Declaration.**

DECLARATION OF DELIVERY OR ACQUISITION IN INDIAN COUNTRY

The undersigned is (circle one) an enrolled member of the tribe/authorized representative of the tribe or tribal enterprise, and the property was delivered/acquired within Indian country, for at least partial use in Indian country.

name of buyer

date of delivery/acquisition

address of delivery/acquisition

(9) **Miscellaneous taxes.** The state imposes a number of excise taxes in addition to the most common excise taxes administered by the department (e.g., B&O, public utility, retail sales, and use taxes). The following is a brief discussion of some of these taxes.

(a) **Cigarette tax.** The statutory duties applicable to administration and enforcement of the cigarette tax are divided between the department and the liquor control board. Enforcement of nonvoluntary compliance is the responsibility of the liquor control board. Voluntary compliance is the responsibility of the department of revenue. See chapter 82.24 RCW for specific statutory requirements regarding purchase of cigarettes by Indians and Indian tribes. For a specific ruling regarding the taxability of and stamping requirements for cigarettes manufactured by Indians or Indian tribes in Indian country, please contact the department at:

Department of Revenue

Executive

P.O. Box 47454

Olympia, WA 98504-7454

Where sales of cigarettes are the subject of a government-to-government cooperative agreement, the provisions of that agreement supersede conflicting provisions of this subsection.

(i) Sales of cigarettes to nonmembers by Indians or Indian tribes are subject to the cigarette tax. The wholesaler is obligated to make precollection of the tax. Therefore, Indian or tribal sellers making sales to non-Indian customers must (A) purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales or (B) they may make purchases of cigarettes from licensed cigarette distributors for resale to qualified purchasers or (C) may purchase a stock of untaxed unstamped cigarettes for resale to qualified purchasers if the tribal seller gives advance notice under RCW 82.24.250 and Rule 186.

For purposes of this rule, 'qualified purchaser' means an Indian purchasing for resale within Indian country to other Indians or an Indian purchasing solely for his or her use other than for resale.

(ii) Delivery or sale and delivery by any person of stamped exempt cigarettes to Indians or tribal sellers for sale to qualified purchasers may be made only in such quantity as is approved in advance by the department. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the seller. Evidence submitted may also consist of verified record of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the seller's place of business, records indicating the percentage of such trade that has historically been realized by the seller, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of stamped exempt cigarettes to Indian country or to any Indian or tribal seller thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the resident enrolled membership of the affected tribe.

(iii) Any delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal seller without advance notice to the department will result in the treatment of those cigarettes as contraband and subject to seizure. In addition, the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. See chapter 82.24 RCW.

Approval for sale or delivery to Indian or tribal sellers of stamped exempt cigarettes will be denied where the department finds that such Indian or tribal sellers are or have been making sales in violation of this rule.

(iv) Delivery of stamped exempt cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to Indian country. Delivery of stamped exempt cigarettes outside of Indian country at the distributor's dock or place of business or any other location outside of Indian country is prohibited unless the cigarettes are accompanied by an invoice.

(b) **Refuse collection tax.** Indians and Indian tribes are not subject to the refuse collection tax for service provided in Indian country, regardless of whether the refuse collection company hauls the refuse off of Indian country.

(c) **Leasehold excise tax.** Indians and Indian tribes in Indian country are not subject to the leasehold excise tax. Leasehold interests held by nonenrolled persons are subject to tax.

(d) **Fish tax.** Chapter 82.27 RCW imposes a tax on the commercial possession of enhanced food fish, which includes shellfish. The tax is imposed on the fish buyer. The measure of the tax is the value of the enhanced food fish at the

point of landing. A credit is allowed against the amount of tax owed for any tax previously paid on the same food fish to any legally established taxing authority, which includes Indian tribes. Transactions involving treaty fish are not subject to the fish tax, regardless of where the transaction takes place.

(e) **Tobacco tax.** The tobacco tax is imposed on 'distributors' as that term is defined in RCW 82.26.010. Tobacco tax is not imposed on Indian persons or tribes who take delivery of the tobacco in Indian country. Effective July 1, 2002, persons who handle for sale any tobacco products that are within this state but upon which tax has not been imposed are subject to the tobacco tax. Chapter 325, Laws of 2002. Thus, persons purchasing tobacco products for resale from Indians who are exempt from the tobacco tax are subject to tobacco tax on the product. See WAC 458-20-185, Tax on tobacco products.

(f) **Real estate excise tax.** The real estate excise tax is imposed on the seller. A sale of land located in Indian country by a tribe or a tribal member is not subject to real estate excise tax. A sale of land located within Indian country by a nonmember to the tribe or to a tribal member is subject to real estate excise tax.

(g) **Timber excise tax.** Payment of the timber excise tax is the obligation of the harvester. The tribe or tribal members are not subject to the timber excise tax in Indian country. Generally, timber excise tax is due from a nonmember who harvests timber on fee land within Indian country. Timber excise tax is not due if the timber being harvested is on trust land or is owned by the tribe and located in Indian country, regardless of the identity of the harvester. There are some instances in which the timber excise tax might be preempted on non-Indians harvesting timber on fee land in Indian country due to tribal regulatory authority. For such a ruling please contact the department at:

Department of Revenue

Executive

P.O. Box 47454

Olympia, WA 98504-7454

Credits

Statutory Authority: RCW 82.32.300. WSR 02-14-133, S 458-20-192, filed 7/2/02, effective 8/2/02; WSR 00-24-050A, S 458-20-192, filed 11/30/00, effective 1/1/01; WSR 80-17-026 (Order ET 80-3), S 458-20-192, filed 11/14/80; Order ET 76-4, S 458-20-192, filed 11/12/76; Order ET 74-5, S 458-20-192, filed 12/16/74; Order ET 70-3, S 458-20-192 (Rule 192), filed 5/29/70, effective 7/1/70.

Current with amendments adopted through the 16-20 Washington State Register dated, October 19, 2016.

WAC 458-20-192, WA ADC 458-20-192

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

18 U.S.C.A. § 13

§ 13. Laws of States adopted for areas within Federal jurisdiction

Effective: October 11, 1996

Currentness

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b)(1) Subject to paragraph (2) and for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

(2)(A) In addition to any term of imprisonment provided for operating a motor vehicle under the influence of a drug or alcohol imposed under the law of a State, territory, possession, or district, the punishment for such an offense under this section shall include an additional term of imprisonment of not more than 1 year, or if serious bodily injury of a minor is caused, not more than 5 years, or if death of a minor is caused, not more than 10 years, and an additional fine under this title, or both, if--

(i) a minor (other than the offender) was present in the motor vehicle when the offense was committed; and

(ii) the law of the State, territory, possession, or district in which the offense occurred does not provide an additional term of imprisonment under the circumstances described in clause (i).

(B) For the purposes of subparagraph (A), the term "minor" means a person less than 18 years of age.

(c) Whenever any waters of the territorial sea of the United States lie outside the territory of any State, Commonwealth, territory, possession, or district, such waters (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) shall be deemed, for purposes of subsection (a), to lie within the area of the State, Commonwealth, territory, possession, or district that it would lie within if the boundaries of such State, Commonwealth, territory, possession, or district were extended seaward to the outer limit of the territorial sea of the United States.

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CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 686; Pub.L. 100-690, Title VI, § 6477(a), Nov. 18, 1988, 102 Stat. 4381; Pub.L. 103-322, Title X, § 100002, Sept. 13, 1994, 108 Stat. 1996; Pub.L. 104-132, Title IX, § 901(b), Apr. 24, 1996, 110 Stat. 1317; Pub.L. 104-294, Title VI, § 604(b)(32), Oct. 11, 1996, 110 Stat. 3508.)

Notes of Decisions (321)

18 U.S.C.A. § 13, 18 USCA § 13

Current through P.L. 114-248.

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United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 53. Indians (Refs & Annos)

18 U.S.C.A. § 1151

§ 1151. Indian country defined

Currentness

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.)

Notes of Decisions (153)

18 U.S.C.A. § 1151, 18 USCA § 1151

Current through P.L. 114-248.

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United States Code Annotated
 Title 18. Crimes and Criminal Procedure (Refs & Annos)
 Part I. Crimes (Refs & Annos)
 Chapter 53. Indians (Refs & Annos)

18 U.S.C.A. § 1162

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

Effective: July 29, 2010
 Currentness

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska.....	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reservation
Wisconsin.....	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General--

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

CREDIT(S)

(Added Aug. 15, 1953, c. 505, § 2, 67 Stat. 588; amended Aug. 24, 1954, c. 910, § 1, 68 Stat. 795; Pub.L. 85-615, § 1, Aug. 8, 1958, 72 Stat. 545; Pub.L. 91-523, §§ 1, 2, Nov. 25, 1970, 84 Stat. 1358; Pub.L. 111-211, Title II, § 221(b), July 29, 2010, 124 Stat. 2272.)

Notes of Decisions (45)

18 U.S.C.A. § 1162, 18 USCA § 1162

Current through P.L. 114-248.

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United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 3. Agreements with Indians
Subchapter I. Treaties

25 U.S.C.A. § 71

§ 71. Future treaties with Indian tribes

Currentness

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress if section 7873 of Title 26 does not permit a like Federal tax to be imposed on such income.

CREDIT(S)

(R.S. § 2079; Pub.L. 100-647, Title III, § 3042, Nov. 10, 1988, 102 Stat. 3641.)

Notes of Decisions (143)

25 U.S.C.A. § 71, 25 USCA § 71

Current through P.L. 114-248.

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United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 9. Allotment of Indian Lands

25 U.S.C.A. § 334

§ 334. Allotments to Indians not residing on reservations

Currentness

Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as provided in sections 348 and 349 of this title. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Secretary of the Interior or such officer as he may designate, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

CREDIT(S)

(Feb. 8, 1887, c. 119, § 4, 24 Stat. 389; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

Notes of Decisions (38)

25 U.S.C.A. § 334, 25 USCA § 334

Current through P.L. 114-248.

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United States Code Annotated Title 25. Indians (Refs & Annos) Chapter 9. Allotment of Indian Lands
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25 U.S.C.A. § 345

§ 345. Actions for allotments

Currentness

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

CREDIT(S)

(Aug. 15, 1894, c. 290, § 1, 28 Stat. 305; Feb. 6, 1901, c. 217, § 1, 31 Stat. 760; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.)

REPEAL OF SECTION

<Act June 28, 1906, c. 3572, § 1, 34 Stat. 540, provided in part that: "the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eighth Statutes at Large, page three hundred and five [this section], granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed as far as the same relate to the Osage Indians; and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided.">

Notes of Decisions (157)

25 U.S.C.A. § 345, 25 USCA § 345

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United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 9. Allotment of Indian Lands

25 U.S.C.A. § 349

§ 349. Patents in fee to allottees

Currentness

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

CREDIT(S)

(Feb. 8, 1887, c. 119, § 6, 24 Stat. 390; May 8, 1906, c. 2348, 34 Stat. 182.)

Notes of Decisions (169)

25 U.S.C.A. § 349, 25 USCA § 349

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United States Code Annotated

Title 25. Indians (Refs & Annos)

Chapter 15. Constitutional Rights of Indians (Refs & Annos)

Subchapter III. Jurisdiction over Criminal and Civil Actions (Refs & Annos)

25 U.S.C.A. § 1321

§ 1321. Assumption by State of criminal jurisdiction

Effective: July 29, 2010

Currentness

(a) Consent of United States

(1) In general

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(2) Concurrent jurisdiction

At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of Title 18 within the Indian country of the Indian tribe.

(b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

CREDIT(S)

(Pub.L. 90-284, Title IV, § 401, Apr. 11, 1968, 82 Stat. 78; Pub.L. 111-211, Title II, § 221(a), July 29, 2010, 124 Stat. 2271.)

Notes of Decisions (15)

25 U.S.C.A. § 1321, 25 USCA § 1321
Current through P.L. 114-248.

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United States Code Annotated

Title 25. Indians (Refs & Annos)

Chapter 15. Constitutional Rights of Indians (Refs & Annos)

Subchapter III. Jurisdiction over Criminal and Civil Actions (Refs & Annos)

25 U.S.C.A. § 1322

§ 1322. Assumption by State of civil jurisdiction

Currentness

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

CREDIT(S)

(Pub.L. 90-284, Title IV, § 402, Apr. 11, 1968, 82 Stat. 79.)

Notes of Decisions (102)

25 U.S.C.A. § 1322, 25 USCA § 1322

Current through P.L. 114-248.

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United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter III. Jurisdiction over Criminal and Civil Actions (Refs & Annos)

25 U.S.C.A. § 1323

§ 1323. Retrocession of jurisdiction by State

Currentness

(a) Acceptance by United States

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Repeal of statutory provisions

Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

CREDIT(S)

(Pub.L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79.)

Notes of Decisions (24)

25 U.S.C.A. § 1323, 25 USCA § 1323

Current through P.L. 114-248.

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United States Code Annotated

Title 25. Indians (Refs & Annos)

Chapter 15. Constitutional Rights of Indians (Refs & Annos)

Subchapter III. Jurisdiction over Criminal and Civil Actions (Refs & Annos)

25 U.S.C.A. § 1324

§ 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Currentness

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

CREDIT(S)

(Pub.L. 90-284, Title IV, § 404, Apr. 11, 1968, 82 Stat. 79.)

Notes of Decisions (2)

25 U.S.C.A. § 1324, 25 USCA § 1324

Current through P.L. 114-248.

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United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter III. Jurisdiction over Criminal and Civil Actions (Refs & Annos)

25 U.S.C.A. § 1325

§ 1325. Abatement of actions

Currentness

(a) Pending actions or proceedings; effect of cession

No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) Criminal actions; effect of cession

No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

CREDIT(S)

(Pub.L. 90-284, Title IV, § 405, Apr. 11, 1968, 82 Stat. 80.)

25 U.S.C.A. § 1325, 25 USCA § 1325

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United States Code Annotated

Title 25. Indians (Refs & Annos)

Chapter 15. Constitutional Rights of Indians (Refs & Annos)

Subchapter III. Jurisdiction over Criminal and Civil Actions (Refs & Annos)

25 U.S.C.A. § 1326

§ 1326. Special election

Currentness

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

CREDIT(S)

(Pub.L. 90-284, Title IV, § 406, Apr. 11, 1968, 82 Stat. 80.)

Notes of Decisions (5)

25 U.S.C.A. § 1326, 25 USCA § 1326

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United States Code Annotated Title 25. Indians (Refs & Annos) Chapter 24. Indian Land Consolidation

25 U.S.C.A. § 2201

§ 2201. Definitions

Effective: December 2, 2008

Currentness

For the purpose of this chapter--

(1) "Indian tribe" or "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;

(2) "Indian" means--

(A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land;

(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 2206 of this title, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that State.¹

(3) "Secretary" means the Secretary of the Interior;

(4)(i) "trust or restricted lands" means lands, title to which is held by the United States in trust for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation; and

(ii) "trust or restricted interest in land" or "trust or restricted interest in a parcel of land" means an interest in land, the title to which interest is held in trust by the United States for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.

(5) "heirs of the first or second degree" means parents, children, grandchildren, grandparents, brothers and sisters of a decedent.

(6) "parcel of highly fractionated Indian land" means a parcel of land that the Secretary, pursuant to authority under a provision of this chapter, determines to have, as evidenced by the Secretary's records at the time of the determination--

(A) 50 or more but less than 100 co-owners of undivided trust or restricted interests, and no 1 of such co-owners holds a total undivided trust or restricted interest in the parcel that is greater than 10 percent of the entire undivided ownership of the parcel; or

(B) 100 or more co-owners of undivided trust or restricted interests;

(7) the term "land" means any real property;

(8) "person" or "individual" means a natural person;

(9) "eligible heirs" means, for purposes of section 2206 of this title, any of a decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are--

(A) Indian; or

(B) lineal descendants within 2 degrees of consanguinity of an Indian; or

(C) owners of a trust or restricted interest in a parcel of land for purposes of inheriting by descent, renunciation, or consolidation agreement under section 2206 of this title, another trust or restricted interest in such parcel from the decedent; and

(10) "without regard to waste" means, with respect to a life estate interest in land, that the holder of such estate is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen.

CREDIT(S)

(Pub.L. 97-459, Title II, § 202, Jan. 12, 1983, 96 Stat. 2517; Pub.L. 106-462, § 103(1), Nov. 7, 2000, 114 Stat. 1992; Pub.L. 108-374, § 6(b), Oct. 27, 2004, 118 Stat. 1804; Pub.L. 110-453, Title II, § 207(a), Dec. 2, 2008, 122 Stat. 5030.)

Footnotes

1 So in original. The period probably should be a semicolon.

25 U.S.C.A. § 2201, 25 USCA § 2201

Current through P.L. 114-248.

United States Code Annotated

Title 25. Indians (Refs & Annos)

Chapter 45. Protection of Indians and Conservation of Resources

25 U.S.C.A. § 5102

Formerly cited as 25 USCA § 462

§ 5102. Existing periods of trust and restrictions on alienation extended

Effective: September 1, 2016

Currentness

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

CREDIT(S)

(June 18, 1934, c. 576, § 2, 48 Stat. 984.)

Notes of Decisions (11)

25 U.S.C.A. § 5102, 25 USCA § 5102

Current through P.L. 114-248.

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United States Code Annotated

Title 25. Indians (Refs & Annos)

Chapter 45. Protection of Indians and Conservation of Resources

25 U.S.C.A. § 5108

Formerly cited as 25 USCA § 465

§ 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

Currentness

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

CREDIT(S)

(June 18, 1934, c. 576, § 5, 48 Stat. 985; Nov. 1, 1988, Pub.L. 100-581, Title II, § 214, 102 Stat. 2941.)

Notes of Decisions (165)

25 U.S.C.A. § 5108, 25 USCA § 5108

Current through P.L. 114-248.

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United States Code Annotated

Title 25. Indians (Refs & Annos)

Chapter 45. Protection of Indians and Conservation of Resources

25 U.S.C.A. § 5125

Formerly cited as 25 USCA § 478

§ 5125. Acceptance optional

Currentness

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

CREDIT(S)

(June 18, 1934, c. 576, § 18, 48 Stat. 988.)

Notes of Decisions (5)

25 U.S.C.A. § 5125, 25 USCA § 5125

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United States Code Annotated

Title 25. Indians (Refs & Annos)

Chapter 45. Protection of Indians and Conservation of Resources

25 U.S.C.A. § 5126

Formerly cited as 25 USCA § 478-1

§ 5126. Mandatory application of sections 5102 and 5124

Currentness

Notwithstanding section 5125 of this title, sections 5102 and 5124 of this title shall apply to--

(1) all Indian tribes,

(2) all lands held in trust by the United States for Indians, and

(3) all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of the Indians in the lands.

CREDIT(S)

(Pub.L. 101-301, § 3(a), May 24, 1990, 104 Stat. 207.)

25 U.S.C.A. § 5126, 25 USCA § 5126

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1353

§ 1353. Indian allotments

Currentness

The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.

The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands held on or before December 21, 1911, by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 934.)

Notes of Decisions (26)

28 U.S.C.A. § 1353, 28 USCA § 1353

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United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1360

§ 1360. State civil jurisdiction in actions to which Indians are parties

Currentness

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

<i>State of</i>	<i>Indian country affected</i>
Alaska.....	All Indian country within the State
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reservation
Wisconsin.....	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

CREDIT(S)

(Added Aug. 15, 1953, c. 505, § 4, 67 Stat. 589; amended Aug. 24, 1954, c. 910, § 2, 68 Stat. 795; Aug. 8, 1958, Pub.L. 85-615, § 2, 72 Stat. 545; Nov. 6, 1978, Pub.L. 95-598, Title II, § 239, 92 Stat. 2668; July 10, 1984, Pub.L. 98-353, Title I, § 110, 98 Stat. 342.)

Notes of Decisions (138)

28 U.S.C.A. § 1360, 28 USCA § 1360

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Corrected Opening Brief was served on counsel for the Plaintiff by mailing on January 17th, 2017, in a postage paid envelope addressed as follows:

Joshua L. Choate
Assistant Attorney General
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

A copy of the Corrected Opening Brief, pursuant to RAP 10.10 was sent by mail to Defendants at 908 E. River Road, Puyallup, WA. 98371.

DATED this 17th day of January, 2017


ROBERT E. KOVACEVICH, WSBA# 2723
Attorney for Defendant